No. 89-1541-CFX
Status: GRANTED

Docketed:
April 2, 1990

Title: Roderick DeArment, Acting Secretary of Labor, Petitioner
v.
Occupational Safety and Health Review Commission, et al.

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Faught,John D.

3/13/90: Ord. granting ext. of time to file, to and including 4/9, by White, J., (CITED); 40 printed copies recd. 4/2.

Entry	Date	Note	Proceedings and Orders
1	Mar 12 1990	G	Application (A89-646) to extend the time to file a petition for a writ of certiorari from March 22, 1990 to April 9, 1990, submitted to Justice White.
2	Mar 13 1990		Application (A89-646) granted by Justice White extending the time to file until April 9, 1990.
3	Apr 2 1990	G	Petition for writ of certiorari filed.
5	May 1 1990		Order extending time to file response to petition until June 4, 1990.
6	Jun 1 1990		Brief of respondent CF&I Steel Corporation in opposition filed.
7	Jun 5 1990		DISTRIBUTED. June 21, 1990
8	Jun 8 1990	X	Reply brief of petitioner Elizabeth Dole, Secretary of Labor filed.
9	Jun 25 1990		Petition GRANTED.
			**********
11	Aug 1 1990		Order extending time to file brief of petitioner on the merits until August 16, 1990.
15	Aug 7 1990	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
12	Aug 16 1990		Brief of petitioner Elizabeth Dole, Secretary of Labor filed.
13	Aug 16 1990		Brief amicus curiae of AFL-CIO filed.
14	Aug 20 1990		Record filed.
		*	Certified original record received from USCA 10.
16	Sep 7 1990	D	Motion of Occupational Safety and Health Review Commission for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Sep 18 1990		Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
21	Sep 18 1990	G	Motion of Occupational Safety and Health Review Commission for leave to file a brief as amicus curiae filed.
19	Sep 19 1990		Brief amicus curiae of American Iron & Steel Institute filed.
20	Sep 19 1990		Brief amicus curiae of National Assn. of Manufacturers, et al. filed.

No. 89-1541-CFX

Entry	Date	Note	Proceedings and Orders
22	Sep 19 1990		Brief of respondent CF&I Steel Corporation filed.
25	Sep 28 1990		CIRCULATED.
23	Oct 1 1990		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
24	Oct 1 1990		Motion of Occupational Safety and Health Review Commission for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
26	Oct 9 1990		Motion of Occupational Safety and Health Review Commission for leave to file a brief as amicus curiae GRANTED. Justice Souter OUT.
27	Oct 19 1990		SET FOR ARGUMENT TUESDAY, NOVEMBER 27, 1990. (2ND CASE)
28	Oct 24 1990	X	Reply brief of petitioner Elizabeth Dole, Secretary of Labor filed.
29	Nov 27 1990		ARGUED.

89- 1541

No.

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
AND
CF&I STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Secretary of Labor, rather than the Occupational Safety and Health Review Commission, is entitled to deference in the interpretation of a Department of Labor regulation if the Secretary's and the Commission's interpretations of the regulation conflict.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
AND
CF&I STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 891 F.2d 1495. The decision of the Occupational Safety and Health Review Commission (App., *infra*, 14a-54a) is reported at 12 O.S.H. (BNA) 2067 and 1986-1987 O.S.H. Dec. (CCH) ¶ 27,691. The decision of the administrative law judge (App., *infra*, 55a-91a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 12a-13a) was entered on December 22, 1989. On March 14, 1990, Justice White extended the time for filing a petition for writ of cer-

tiorari to April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651(b)(3), 655, 658, 659, 660 (1982 & Supp. V 1987), and 661) are reprinted at App., *infra*, 92a-110a. Department of Labor regulations 29 C.F.R. 1910.134 and 1910.1029(g) are also reprinted at App., *infra*, 111a-123a.

STATEMENT

1. In 1970, Congress enacted the Occupational Safety and Health Act (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590 (29 U.S.C. 651 *et seq.*), "to assure so far as possible * * * safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. 651(b). Toward that end, the OSH Act provides the Secretary of Labor with a broad array of regulatory and enforcement responsibilities. Specifically, she has authority to "promulgate, modify, or revoke any occupational safety or health standard" (29 U.S.C. 655(b)); to grant variances from such standards to particular employers (29 U.S.C. 655(d)); and to conduct investigations and worksite inspections to assure compliance with health and safety requirements (29 U.S.C. 657). The OSH Act also empowers her to issue citations to employers whenever she believes that an employer has violated the OSH Act or any standard, rule, regulation, or order promulgated by the Secretary (29 U.S.C. 658); to propose civil penalties against cited employers (29 U.S.C. 659(a), 666); to prescribe abatement periods for cited health and safety violations (29 U.S.C. 658(a), 659(c)); and to seek injunctive relief in federal court from imminent dangers to employee safety and health. 29 U.S.C. 662(a). See generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 3-4 (1985); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 8-9 (1980); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 445-446 (1977).[1]

[1] The Secretary has delegated many of her OSH Act responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA), an agency within the Department of Labor that is responsible for enforcing the OSH Act. See generally Secretary of Labor's Order No. 12-71, 36 Fed. Reg. 8754 (1971); Order No. 8-76, 41 Fed. Reg. 25,059 (1976); Order No. 9-83, 48 Fed. Reg. 35,736 (1983).

In the OSH Act, Congress also created the Occupational Safety and Health Review Commission (OSHRC) "for carrying out adjudicatory functions." 29 U.S.C. 651(b)(3). An employer may contest the Secretary's citation or notice of penalty before the Commission; in addition, an employee or employees' representative may challenge the time for abatement in the Secretary's citation. 29 U.S.C. 659(c). When a citation, penalty, or abatement date is contested, the Commission must "afford an opportunity for a hearing * * * [and] thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 446. The OSH Act vests the Commission with power to compel attendance of witnesses, production of documents, and taking of evidence. 29 U.S.C. 661(h) and (i).

The OSH Act limits the Commission's rulemaking authority to establishment of procedural norms for adjudicatory hearings before the Commission and its administrative law judges. 29 U.S.C. 661(g). The Commission has no jurisdiction over petitions to review the Secretary's promulgation of a safety or health standard; rather, the statute provides the courts of appeals with authority to review challenges to standards. 29 U.S.C. 655(f). If the Commission affirms a citation, only the Secretary may seek enforcement of the administrative order in the court of appeals. 29 U.S.C. 660(b). The Secretary or an aggrieved party may seek judicial review of adverse Commission decisions. *Ibid.* All civil penalties assessed in final Commission decisions are payable to the Secretary and are recoverable only in a civil action brought by the Secretary in federal district court. 29 U.S.C. 663, 666(*l*); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 447.

2. In 1976, the Secretary determined that coke oven emissions are carcinogenic. Pursuant to her rulemaking authority

under the Act, she promulgated a standard governing occupational exposure to coke oven emissions. 41 Fed. Reg. 46,742-46,790 (1976); 29 C.F.R. 1910.1029. The standard requires limiting employee exposure to a specified level of coke oven emissions in a "regulated area" (29 C.F.R. 1910.1029(c)). The standard also requires the use of engineering and work practice controls to achieve that reduction (29 C.F.R. 1910.1029(f)). Of particular relevance for purposes of this case, the standard permits the use of respirators as a method of compliance in certain circumstances – for example, when controls are not yet sufficient to reduce exposure to the permissible limit (29 C.F.R. 1910.1029(g)(1)). The coke oven regulation includes requirements concerning provision of respirators in such circumstances (29 C.F.R. 1910.1029(g)), and one of these requirements incorporates into the coke oven regulation a general regulation regarding respirators. See 29 C.F.R. 1910.1029(g)(3) ("The employer shall institute a respiratory program in accordance with § 1910.134 of this part.").

3. In August 1979, the Secretary conducted an inspection at respondent's coke oven facility in Pueblo, Colorado.[2] The Secretary and respondent had previously reached a settlement regarding citations issued to respondent for violations of the coke oven emissions standard. App., *infra*, 19a. As a result of the August 1979 inspection, the Secretary issued three additional citations. *Id.* at 90a-91a. One part of one citation is currently at issue. *Id.* at 3a, 36a-37a.

The inspection disclosed that respondent had conducted two kinds of respirator tests with its employees. App., *infra*, 79a. The first was a "positive/negative pressure test," in which a worker places the respirator on his face, inhales or exhales, and checks for leakage along the respirator seal; it is not conducted in a "test atmosphere." *Id.* at 3a, 59a. The second was a "banana oil" test, in which a worker, while wearing a respirator, is put in

[2] References in this petition to respondent are to respondent CF&I Steel Corporation, which briefed and argued the case in the court of appeals. OSHRC was nominally a respondent in the court of appeals (pursuant to Fed. R. App. P. 15), but did not participate in those proceedings.

a "test atmosphere" and exposed to isoamyl acetate ("banana oil") in order to determine whether he can detect the odor of the chemical despite the respirator. *Id.* at 3a, 38a, 59a. The Secretary discovered that 28 of respondent's employees had detected banana oil, but that respondent had failed to give them different respirators. Instead, respondent had simply sent the employees, with the same respirators, into a "regulated area." *Id.* at 3a, 38a-39a, 78a. Some of these employees were exposed to coke oven emission levels exceeding the permissible exposure limit. *Id.* at 81a-82a. Relying on the fact that "28 coke oven employees working in the regulated area exposed to coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit" (*id.* at 37a), the Secretary issued a citation for a "willful" violation of 29 C.F.R. 1910.1029(g)(3) – the coke oven provision that incorporates the respirator regulation in 29 C.F.R. 1910.134. The Secretary assessed the maximum penalty of $10,000.[3]

4. Respondent contested the citation. A Commission administrative law judge (ALJ) held five days of hearings in February 1980, and issued an opinion upholding the citation in August 1981. The ALJ found that, as the Secretary charged, 28 employees detected banana oil in the banana oil test and were then sent into the coke oven areas without any adjustment in their respirators. App., *infra*, 79a-82a.

The Secretary maintained that Section 1910.1029(g)(3) of the coke oven emissions standard, by incorporation of the respiratory protection program requirement in 29 C.F.R. 1910.134(e) – and 1910.134(e)(5) in particular[4] – requires employers both to assure that each employee's respirator fits properly by using a test atmosphere (as in the banana oil test) and to provide a different type or size respirator if an employee's equipment fails the test. App., *infra*, 39a, 78a-79a.

[3] A "willful" violation is the most serious form of civil violation, and the highest civil penalties are authorized for such violations; violations may also be characterized as "serious" and "not serious." 29 U.S.C. 666.

[4] 29 C.F.R. 1910.134(e)(5) provides, in part, that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, * * * and, finally, to wear it in a test atmosphere."

Respondent defended on the ground that the standard did not require testing in a test atmosphere at all, and that the positive/negative tests fully satisfied the standard. *Id.* at 78a-79a.

The ALJ agreed with the Secretary. He concluded that the pertinent regulation—29 C.F.R. 1910.134(e)(5)—requires qualitative fit testing in a test atmosphere and that it imposed a requirement that a respirator fit properly. App., *infra*, 79a. "Since these test results show that the employees were not properly fitted, [respondent] was obligated to provide a different respirator to those that failed the test." *Id.* at 80a. The ALJ concluded that the violation was willful and observed that respondent's "cynical disregard for the safety of its workers and • • • deliberate disregard for the standard itself make[] even the maximum penalty seem pitifully inadequate." *Id.* at 82a.

5. Five years later, in September 1986, the Commission reversed the ALJ's judgment. The Commission concluded that Section 1910.1029(g)(3)—the coke oven provision incorporating the respirator standard—is a "training standard" and "does not require the employer to assure proper fit of an employee's respirator." App., *infra*, 40a. The Commission emphasized that the next paragraph of the coke oven regulation—Section 1910.1029(g)(4)—explicitly requires that respirators fit properly; thus, in the Commission's view, Section 1910.1029(g)(3) could not, without redundancy, be read to require proper respirator fit as well. App., *infra*, 40a, 41a. The Commission also concluded that, on its own terms, the general respirator standard of Section 1910.134 does not impose a requirement that an employer assure respirator fit; the Commission stressed that Section 1910.134 refers to instruction and training and should be interpreted as a training program. App., *infra*, 40a. Thus, the Commission interpreted Section 1910.134(e)(5) as "requiring the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal" (App., *infra*, 41a), and as requiring the employer to give an employee the opportunity to wear the respirator in a test atmosphere during training. *Ibid.* The Commission concluded, however, that it does not require the employer to insure that proper fit is achieved. *Ibid.*

Inasmuch as respondent's employees had received instruction and an opportunity to wear respirators in a test atmosphere, the Commission concluded that the requirements of Section 1910.134 had been met. App., *infra*, 45a. According to the Commission, "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate." *Ibid.* Accordingly, the Commission vacated the citation. One Commissioner dissented.[5]

6. The Secretary petitioned for review. On December 22, 1989, the court of appeals denied the petition and upheld the Commission's determination. The court noted that an agency's interpretation of a statute is entitled to deference and must be accepted if reasonable, and that such deference is particularly appropriate where an agency "interprets its own administrative regulations." App., *infra*, 4a. The court then observed that, although the Secretary had interpreted 29 C.F.R. 1910.1029(g)(3) as a testing standard for proper fit, the Commission had interpreted it as a training standard. "The question therefore arises: When the Secretary and Commission disagree over the interpretation of an OSHA regulation, which view prevails, *i.e.*, to whom is deference owed?" App., *infra*, 4a. Observing that the question is "an issue upon which the federal circuits are split" (*ibid.*), the court concluded that, "in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission." *Id.* at 2a.[6]

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[5] The dissenting Commissioner reasoned that, regardless of whether Section 1910.134 is a "training standard or a use standard," the Secretary had established a violation. App., *infra*, 51a. He maintained that, even if the standard is construed as a training provision, the 28 employees who used respirators that did not fit "were not trained to comprehend the proper fit of respirators, or to use the respirators properly." *Id.* at 52a. He also agreed that the violation was appropriately characterized as "willful." Emphasizing that 28 employees failed the banana oil test, he noted that the conduct "demonstrates, at the very least, plain indifference to employee safety." *Id.* at 54a.

[6] The panel distinguished the Tenth Circuit's earlier decision in *Brennan* v. *OSHRC & Kesler*, 513 F.2d 553, 554 (1975), in which the court of appeals had appeared to endorse the contrary rule and pay deference to the interpretation of the Secretary. Because, in the panel's view, the Commission's interpretation

Since in the court's view the statutory language did not settle the matter, the court consulted the legislative history. It noted that Congress had decided against combining prosecutorial and adjudicative authority in the Secretary, and had created the Commission as an "autonomous, independent, and quasi-judicial body." App., *infra*, 6a. The court emphasized that the "adjudicative function necessarily encompasses the power to 'declare' the law." *Id.* at 7a. Thus, the court concluded that "where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission." *Ibid.*

The court of appeals took note of *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (Pepco), in which this Court concluded that the interpretations of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, were not entitled to deference because the Board has only adjudicative, and not policymaking, authority. The court of appeals viewed this Court's statement as "dicta" (App., *infra*, 8a) and, for two reasons, distinguishable. First, Longshore adjudications are nonaccusatory, "whereas OSHA requires accusatory proceedings that may result in substantial penalties." *Ibid.* Second, Longshore claims are brought by private citizens, not by the government. *Ibid.* The court concluded that the Longshore context does not "implicate" Congress's concerns about vesting prosecutorial and adjucative functions in a single governmental entity, and that the "need for a strict separation of prosecutorial and adjudicative functions is therefore far more acute in the case of OSHA." *Ibid.*

The court of appeals also stated that its decision did not give "carte blanche" to the Commission; it observed that "[t]he

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in that case was not supported by the regulatory language, the panel did not believe that *Kesler* established a rule applicable to this case. App., *infra*, 5a.

Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity." App., *infra*, 9a. However, if there is "genuine ambiguity," the court held, the reasonable interpretation of the Commission will control. *Ibid.* The court also noted that, if the Secretary maintains that a different result should prevail, she may amend or clarify the regulations through rulemaking. *Id.* at 7a, 11a.

Turning to the merits of the specific interpretive question at issue, the court ruled that the Commission did not unreasonably interpret 29 C.F.R. 1910.1029(g)(3) to be a training standard rather than a testing standard to ensure continuing proper fit. App., *infra*, 9a-11a. The court found support for its position in 29 C.F.R. 1910.134(e)(5)'s reference to "training." At the same time, the court noted that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language." App., *infra*, 11a. Nonetheless, applying its rule that it would defer 'to a reasonable Commission interpretation, the court upheld the Commission's decision.

REASONS FOR GRANTING THE PETITION

This Court should review the court of appeals' holding that it would defer to the Commission's interpretation of an OSH Act standard that the Secretary had promulgated rather than to the Secretary's interpretation. As the court of appeals' opinion recognizes, the circuits are in widespread conflict on the question. Furthermore, in concluding that a purely adjudicatory body (the Commission) rather than the policymaking and enforcement authority (the Secretary) is entitled to deference, the court of appeals misapplied the principles underlying this Court's decisions on deference. Finally, the question is of considerable importance. As this case illustrates, the court of appeals' rule frustrates the Secretary's exercise of the policymaking and enforcement duties entrusted to her by Congress.

1. The courts of appeals are severely divided on the question of which entity—the Secretary or the Commission—is entitled

to deference under the OSH Act. The First, Fifth, Seventh, and Eleventh Circuits have endorsed a rule favoring the Secretary's interpretation. *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d 61, 64-66 (1st Cir. 1985); *Brock* v. *Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7th Cir. 1987); *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 319-320 (5th Cir. 1987); *Brock* v. *Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 569-570 (11th Cir. 1987). Cf. *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 & n.2 (D.C. Cir. 1986) (noting split under OSH Act, and holding that, under the Federal Mine Safety and Health Act, deference is accorded to the Secretary rather than to the Federal Mine Safety and Health Review Commission). In contrast, in addition to the Tenth Circuit in this case, the Second, Fourth, Sixth, and Ninth Circuits defer to the Commission. *Marshall* v. *Western Elec., Inc.*, 565 F.2d 240, 244 (2d Cir. 1977); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-1262 (4th Cir. 1974); *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978); *Brock* v. *Bechtel Power Corp.*, 803 F.2d 999, 1000-1001 (9th Cir. 1986).[7]

This division of authority undermines important values of uniformity. Moreover, as this case illustrates, a deference rule is often outcome determinative, since the rule establishes which of two reasonable, but conflicting, interpretations the court will approve. See App., *infra*, 11a ("While it is certainly possible to reach an alternate interpretation of the ambiguous regulatory

[7] The court of appeals cited the Eighth Circuit as one of the Circuits favoring deference to the Commission. App., *infra*, 5a (citing *Brennan* v. *OSHRC*, 513 F.2d 713, 715-716 (1975)). The Eighth Circuit's most recent decision, however, suggests that deference to the Commission is not appropriate. See *Brock* v. *Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1137 (1988).

The Third Circuit has not articulated a clear deference rule governing cases in which there is a conflict between the Secretary's and the Commission's interpretations. Compare *Bethlehem Steel Corp.* v. *OSHRC*, 573 F.2d 157, 160 (1978) (suggesting that deference is inapplicable when Commission's and Secretary's interpretations conflict), with *Director, OWCP* v. *Mangifest*, 826 F.2d 1318, 1323 n.11 (3d Cir. 1987) (explaining *Bethlehem Steel* on the ground that the Secretary had failed to clarify an ambiguous regulation interpreted in conflicting ways by the Commission). See also *Donovan* v. *Adams Steel Erectors, Inc.*, 766 F.2d 804, 807 n.3 (3d Cir. 1985).

language * * *, we defer to the interpretation chosen by the Commission."); *United Steelworkers* v. *Schuylkill Metals*, 828 F.2d at 320 ("In this case, the standard of review determines the outcome."); *Brennan* v. *Gilles & Cotting*, 504 F.2d at 1262 (statute allows decision "either way" on question of whether a general contractor is jointly responsible with subcontractor for safety violations hazardous to subcontractor workmen, and court defers to interpretation of Commission). In addition, the existence of conflicting rules on this issue provides a strong incentive for forum shopping by the party seeking review of a Commission decision. See 29 U.S.C. 660(a) (1982 & Supp. V 1987) (aggrieved party may obtain review of Commission order in the circuit in which violation occurred, where the employer has its principal place of business, or in the District of Columbia Circuit). Thus, there is a substantial conflict in the circuits, and a need for this Court to establish the governing rule.[8]

2. The decision below is incorrect. The court of appeals' fundamental error is its failure to recognize that the Secretary is entitled to deference because she is charged by Congress with policymaking and rulemaking; the Commission is simply an adjudicatory agency. Judicial deference is rooted in a proper respect for the "legislative delegation to an agency" of policymaking responsibility. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984). Thus, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (*ibid.*), and the dispositive question is whether the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute" (*id.* at 845) (internal quotation marks omitted). Deference is appropriate because an

[8] The court of appeals' suggestion that deference to the Commission is appropriate only when there is ambiguity in a regulation (App., *infra*, 7a, 9a) does not minimize the reach of its decision because deference is generally relevant only when there is ambiguity in the language of a regulation (or statute). See also *Lukman* v. *Director, OWCP*, No. 88-1733 (10th Cir. Feb. 22, 1990), slip op. 5 n.3 (noting that, "[i]n *Dole*, we joined those Circuits which defer to the Commission").

agency's interpretations are part of the policymaking responsibility that has been delegated to the agency.[9]

As this Court has observed, "[i]t is the Secretary, not the Commission, who sets the substantive standards for the workplace," and "enforcement of the Act is the sole responsibility of the Secretary." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 6-7. In contrast, the Commission's function "is to act as a neutral arbiter and determine whether the Secretary's citation should be enforced over employee or union objections." *Id.* at 7. A necessary component of Congress's grant to the Secretary of broad and exclusive authority to define, investigate, and prosecute health and safety violations, see p. 2, *supra*, is the authority to provide guidance for both OSHA compliance officers and affected employers and employees by developing reasonable interpretations of the standards and regulations issued under her rulemaking authority. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 (Commission may not review Secretary's decision to issue or withdraw a citation because the Secretary's authority to make such decisions is a "necessary adjunct" of her power to set substantive standards and issue citations).

In light of Congress's explicit grant of authority to the Secretary, not to the Commission, to promulgate standards for employee safety and health, it is clear that the Secretary's interpretation of her own regulations should receive deference. The Commission does not write, or participate in any way, in the formulation of health and safety standards. Cf. *Mullins Coal*

[9] "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). See also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). An administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U.S. at 16-17. The particular deference due an agency's interpretation of its regulation rests on the fact that the interpretation has been provided by "the agency responsible for promulgating and administering the regulation." *Immigration & Naturalization Service* v. *Stanisic*, 395 U.S. 62, 72 (1969).

Co. v. *Director, OWCP*, 484 U.S. 135, 159 (1987) ("[T]he Secretary's view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation."). The Commission is vested "with no direct policymaking functions" (*Donovan* v. *OSHRC*, 713 F.2d 918, 930 (2d Cir. 1983)), and "[u]nlike the NLRB and the FTC, it has neither prosecution nor enforcement powers," *Dale M. Madden Constr., Inc.* v. *Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). The Commission, as an institution with a solely adjudicatory function, is not well situated to develop broad expertise in administering an occupational safety and health program, or in appreciating "the likely practical outcomes" of different interpretations of particular safety and health standards. *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d at 66. Because OSHRC reviews only *contested* enforcement actions that the Secretary initiates—a tiny proportion of OSHA's overall activities [10]—the Commission's vision of the program is, of necessity, quite narrow. The Secretary, in contrast, has gained a much wider and sharper perspective in the course of developing new and revised standards, of monitoring workplaces across the country for compliance, and of making investigatory and prosecutorial decisions on the broad range of health and safety issues that arise under the Act itself and the standards she has promulgated.

Notwithstanding the Secretary's pivotal role, the court of appeals concluded that deference to the Commission was appropriate to protect the Commission's role under the Act. App., *infra*, 6a-7a. The court emphasized that since the Commission's adjudicative function encompasses a "power to 'declare' the law," deference to the Secretary's interpretation of her regulations, rather than to the Commission's interpretation of them, would undermine that power. *Id.* at 7a.

The court's analysis is off the mark. As an initial matter, even an agency entitled to deference on judicial review does not conclusively " 'declare' the law"; only the reviewing court may prop-

[10] In fiscal year 1988, less than two percent of the Secretary's citations were contested; 174,396 violations were cited during that time. Current Report, 18 O. S. H. Rep. 1668 (BNA) (Mar. 1, 1989).

erly exercise that function. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568 (noting the "ultimate judicial responsibility to determine the law"). And the court of appeals' statement is incorrect even as to the more limited point that an adjudicatory agency must receive deference in its exposition of the governing standard. The Commission's pronouncement about the meaning of the Secretary's regulations are not based on the exercise by the Commission of any regulatory function; as a result, those pronouncements do not qualify for deference under *Chevron* and its progeny. Moreover, deference to the Secretary's reasonable interpretation of her regulations – by the Commission as well as by courts – is not inconsistent with an adjudicatory function.[11] When an adjudicatory body defers to a reasonable administrative interpretation of a regulation or statute, it is not denigrating its adjudicatory authority; it is, rather, exercising that authority in accordance with established principles. *Chevron*, 467 U.S. at 842-845.

The court of appeals also relied on the OSH Act's legislative history, and in particular on the congressional determination to separate the adjudicatory function from the enforcement function. App., *infra*, 6a-7a. This is a slender reed. The legislative history reveals that Congress forged a compromise between bills creating different administrative schemes: one approach would have lodged enforcement authority in the Secretary, but placed rulemaking as well as adjudication authority in separate boards independent of the Secretary; the other approach would have placed all three functions in the Secretary. In the end, Congress provided the Secretary with authority to regulate and enforce, and created the Commission to adjudicate contested citations.[12]

[11] Indeed, at the same time that the court of appeals stressed the importance of the interpretive role to the Commission's adjudicatory function (App., *infra*, 7a), the court also emphasized that the Commission should defer to the Secretary's interpretation and reject it only if "clearly wrong or in the presence of genuine ambiguity." *Id.* at 9a.

[12] During consideration of the bill that ultimately became the OSH Act, labor and management advocates were at odds about whether the Secretary of Labor, in addition to his prosecutorial role, should have power to promulgate safety and health standards and adjudicate contested enforcement cases. The Administration bill, supported by business interests, proposed creation of

For purposes of the issue presented here, the critical point is that Congress entrusted exclusive policymaking authority to the Secretary; indeed, Congress explicitly rejected the proposal to take that authority away from the Secretary.[13]

Thus, the legislative history does not suggest that Congress intended the Commission to have broad interpretive powers. Like the statute itself, this history indicates instead that the principal purpose of creating the Commission was to ensure fair and even-handed treatment of individual employers who have been

separate rulemaking and adjudication boards, both independent of the Secretary, while the Senate and House committee bills, supported by organized labor, combined all three functions in the Secretary. See S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970), and H.R. Rep. No. 1291, 91st Cong., 2d Sess. 17-20, 24 (1970), *reprinted in* Staff of the Senate Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 148, 155, 847-850, 854 (Comm. Print 1971) [hereinafter *Legislative History*]. Senator Javits unsuccessfully proposed in committee a compromise whereby the Secretary would regulate and enforce, and an independent three-person panel would adjudicate (S. Rep. No. 1282, *supra*, at 55 *reprinted in Legislative History* 194), but he was later successful in obtaining its adoption on the Senate floor (*Legislative History* 381-393, 462-479). The creation of an independent adjudicatory panel was included in the House-passed bill (*id.* at 1098-1101), and was adopted by the conference committee (*id.* 1147, 1165-1169).

[13] The OSH Act requires the President to appoint Commissioners "who by reason of training, education, or experience are qualified to carry out the functions of the Commission." 29 U.S.C. 661(a). Some courts have considered this provision an indication that Congress intended to make OSHRC an expert body, and have concluded that courts should therefore defer to its expertise. See, *e.g.*, *Dunlop* v. *Rockwell International*, 540 F.2d 1283, 1289-1290 (6th Cir. 1976). But the provision is not an endorsement of any policy role for the Commission; rather, it reflects congressional concern that the Commissioners have some background in safety and health to assist them in carrying out their adjudicative function. Indeed, the fact that the OSH Act does not require Commission involvement in the formulation of standards or in the resolution of the vast majority of violations confirms OSHRC's lack of a policy role. Thus, there is no Commission review of the Secretary's interpretation of the OSH Act and regulations for the more than 98% of violations that employers do not contest. See 29 U.S.C. 659(a) and note 10, *supra*. Moreover, the OSH Act permits affected persons to challenge the validity of standards that the Secretary promulgates directly in the court of appeals, without *any* review by the Commission. 29 U.S.C. 655(f).

cited for violations.[14] This goal is in no way undermined by requiring deference to the Secretary's interpretations of regulations (or of the statute).

The conclusion that in this context the policymaking entity rather than the adjudicatory entity should receive deference is also supported by principles established in analogous contexts. Referring to the Benefits Review Board and its adjudicatory role under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, this Court stated that "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) *(Pepco)*.[15] Despite the court of

[14] See, *e.g.*, *Legislative History* 464 (Sen. Javits) ("The enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberative act. There are serious penalties involved for the individual enterprise. It is a case by case proposition. It does not apply across the board to every member of industry."); *id.* at 1147 (Sen. Williams) (separation of prosecutorial and adjudicative roles intended "to provide every assurance that fairness and due process would be fairly served"). Critics of the combination of all functions in the Labor Department had objected that management would perceive the Secretary, "traditionally * * * the voice of labor in the administration" (*id.* at 473 (Rep. Anderson)) as unfair to businesses that were cited for violations (*ibid.* (Sen. Holland)), and that the combination would create "an undue concentration of power" with a potential for abuse (*id.* at 426 (Sen. Dominick).

[15] The longshore and harbor workers' compensation program (33 U.S.C. 901 *et seq.*) is similar to the OSH Act in that one entity (the Secretary of Labor) is given policymaking and program functions (33 U.S.C. 939 (1982 & Supp. V 1987)), and another entity (the Benefits Review Board) is given adjudicatory authority (33 U.S.C. 921(b)). The Secretary has delegated her authority to the Director, Office of Workers' Compensation. 20 C.F.R. 701.201, 701.202. Deputy Commissioners subordinate to the Secretary (and thus the Director) make initial determinations on benefits claims (33 U.S.C. 919 (1982 & Supp. V 1987)), and their decisions may be appealed to the Benefits Review Board (33 U.S.C. 921(b)). Unlike OSHRC, the Benefit Review Board's members are appointed by the Secretary of Labor; its decisions nevertheless constitute final agency action from which judicial review may be sought by the Director and other aggrieved parties. 33 U.S.C. 921(c). The Black Lung Benefits Act of 1972 (30 U.S.C. 901 *et seq.*) incorporates this structure. See 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating by reference certain administrative provisions of the Longshore Act). Following

appeals' asserted distinctions (App., *infra*, 7a-8a), this principle is fully applicable to the OSH Act context because in both instances Congress assigned policymaking responsibilities to the Secretary. Neither the fact that the Secretary (rather than a private citizen) brings OSH Act enforcement actions nor the fact that in the OSH Act Congress separated that prosecutorial function from the adjudicatory function undercuts this basic identity. Similarly, under the Federal Mine Safety and Health Act of 1977 (the MSH Act) (30 U.S.C. 801 *et seq.*), the Secretary of Labor, rather than the Mine Health and Safety Review Commission, receives deference in the interpretation of the Secretary's regulations. See *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537 n.2 (Scalia, J.) ("We see no reason to depart from the view we announced with regard to the Mine Act * * * which leaves interpretive discretion where it normally resides, with the policy-maker rather than the adjudicator.").[16]

Pepco, the courts of appeals have concluded that, because "the BRB's function is more akin to that of a District Court, unlike other agencies' policymaking bodies," due deference should be accorded to the views of the Director, and not the Board, in cases of conflict over statutory or regulatory interpretation between the Director and the Board. *Alford* v. *American Bridge Div., U.S. Steel Corp.*, 642 F.2d 807, 809 & n.2 (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982). See also *Lukman* v. *Director, OWCP*, slip op. 5; *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987); *Peabody Coal Co.* v. *Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Bethlehem Mines Corp.* v. *Director, OWCP*, 766 F.2d 128, 130 (3d Cir. 1985). Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 163-164 (1987) (Court adopts Secretary's reasonable interpretation of black lung regulation that she has promulgated, but also notes Board's agreement with Secretary); *Morrison-Knudsen Const. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (shared "practice" of Board and the Director is entitled to deference). But see *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 288 (6th Cir. 1988) (neither Board nor Director is entitled to deference).

[16] The Federal Mine Safety and Health Act of 1977 established a structure for the mine safety and health program similar to the occupational safety and health program. The Secretary of Labor is entrusted with rulemaking, investigative, and prosecutorial authority (30 U.S.C. 811, 813-816 (1982 & Supp. V 1987)), and the Federal Mine Safety and Health Review Commission has adjudicative powers (30 U.S.C. 815, 823). The legislative history of the MSH Act (which was passed seven years after the OSH Act) confirms that the Secretary

Under the OSH Act, as in these other contexts, the policymaker should receive deference in the interpretation of the policymaker's regulations.

3. The issue presented in this case is of considerable importance. As we have noted, a court's deference rule is often outcome determinative, and thus a rule favoring deference to the Commission treads heavily on the policymaking and regulatory role Congress sought to lodge in the Secretary. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 ("a procedure [that] would * * * allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute * * * [would be] a commingling of roles that Congress did not intend"). Moreover, the many decisions in the courts of appeals on this issue (pp. 9-10, *supra*) reveal how frequently the issue recurs. Although the court of appeals in this case suggested that the Secretary can amend the regulation, the amending process is burdensome and time-consuming, and if the Secretary's interpretation of a regulation is reasonable, that process should not be necessary.[17] Furthermore, the court's requirement bars enforcement of the Secretary's interpretation in the interim. In this case, for instance, the court of appeals' holding would enable respondent to escape liability even though, under the Secretary's reasonable interpretation of her own regulations, the employer willfully violated the coke oven emissions standard by requiring its workers to use inadequate respirators in areas with dangerously high emission levels.

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of Labor should receive deference as an aspect of her policymaking and administrative responsibilities: "Since the Secretary of Labor is charged with responsibility for implementing the Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977). See also 1 C.F.R. 305.86-4 (recommendation of Administrative Conference of the United States that legislation adopting a split-enforcement model of agency adjudication explicitly provide that the adjudicatory agency should defer to the rule-making agency's interpretations).

[17] To the extent that the same deference rule applies to statutory interpretations, the Secretary cannot correct a Commission interpretation simply by amending a regulation.

In view of the division in the courts of appeals on a question of such importance, the issue warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2641

ELIZABETH H. DOLE, SECRETARY OF LABOR, PETITIONER

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

CF&I STEEL CORPORATION, INTERVENOR-RESPONDENT

[FILED Dec. 22, 1989]

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (OSHRC No. 79-4786)

Before: MOORE and BALDOCK, Circuit Judges and DAUGHERTY, District Judge.*

BALDOCK, Circuit Judge.

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* The Honorable Frederick A. Daugherty, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

The Secretary of Labor (Secretary) appeals from a decision of the Occupational Safety and Health Review Commission (Commission) vacating a citation charging CF&I Steel Corporation (CF&I) with willfully violating 29 C.F.R. § 1910.1029(g)(3). That regulation governs employee exposure to coke oven emissions. The Secretary argues that CF&I violated the Occupational Safety and Health Act (OSHA) by failing to utilize atmospheric testing, as envisioned by OSHA regulations, to insure that respirators worn by its employees fit properly. The Secretary further contends that her interpretation of OSHA regulations is entitled to deference. In contrast, CF&I favors the Commission's interpretation of OSHA regulations, which holds that atmospheric testing is not required to insure respirator fit, and contends that the Commission's interpretation is entitled to deference.

Our jurisdiction arises under 29 U.S.C. § 660(b). We hold that, in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission. Finding the Commission's interpretation of coke oven respiratory regulations to be reasonable, we affirm.

I.

CF&I operated a steel plant near Pueblo, Colorado. As part of its steel-making operation, the company produced coke, a coal derivative, to fuel its blast furnaces. Coke production creates carcinogenic vapors which are dangerous to workers' health. Acting pursuant to OSHA, the Secretary promulgated regulations setting the maximum allowable emissions for coke ovens and mandating the use of respirators whenever that level was exceeded. *See generally* 29 C.F.R. § 1910.1029. These regulations were upheld following a challenge by CF&I and other coke producers. *See American Iron & Steel Inst. v. OSHA*, 577

F.2d 825 (3d Cir. 1978), *cert. dismissed*, 448 U.S. 917 (1980).

In order to perform their protective function, respirators must be fitted properly on each employee. Although there are several ways to test a respirator for proper fit, two methods are relevant to this case: 1) positive/negative pressure testing whereby the employee places the respirator on his face, inhales or exhales, and checks for any leakage of air along the seal; and, 2) atmospheric testing in which the employee wears a respirator in a room filled with noxious vapors, commonly known as "banana oil" vapors, and tries to detect the odor.

CF&I conducted a training program in respirator usage for its coke oven employees. A training film was produced and shown instructing employees how to perform the positive/negative pressure test. CF&I also conducted atmospheric testing for its employees, twenty-eight of whom detected the odor of banana oil. CF&I allowed these twenty-eight employees to return to work with the same respirator.

The Secretary cited CF&I for failing to equip the twenty-eight employees who detected banana oil with respirators that fit. The ALJ affirmed the citation and, finding CF&I a willful violator, fined the corporation $10,000. On appeal, the Commission reversed the ALJ, holding that 29 C.F.R. § 1910.1029(g)(3) only enunciates a training standard for respirator usage, not a testing standard for respirator fit.

II.

A.

Normally, an administrative agency's interpretation of a statute is entitled to considerable deference and should be disturbed only if unreasonable. *See Chapman v. Department of Health & Human Serv.*, 821 F.2d 523, 527 (10th

Cir. 1987). Such deference is particularly appropriate where an agency interprets its own administrative regulations. *See Edwards v. Califano*, 619 F.2d 865, 868 (10th Cir. 1980). Even when two equally reasonable interpretations are present, the reviewing court must defer to the interpretive choice of the administrative agency. *Brennan v. OSHRC & Kesler*, 513 F.2d 553, 554 (10th Cir. 1975) (*Kesler*).

In the instant case, the Secretary and Commission disagree over the proper interpretation of 29 C.F.R. § 1910.1029(g)(3). The Secretary contends that the regulation requires atmospheric testing to assure that each employee is properly fitted with a respirator while the Commission interprets the regulation as requiring atmospheric testing only in the course of training employees on the proper application of respirators. The question therefore arises: When the Secretary and Commission disagree over the interpretation of an OSHA regulation, which view prevails, *i.e.*, to whom is deference owed?

Whether judicial deference under OSHA is accorded to the regulatory interpretations of the Secretary or the Commission is an issue upon which the federal circuits are split. The First, Fifth, and Seventh Circuits defer to the Secretary. *See United Steelworkers of Am. v. Schuylkill Metals Corp.*, 828 F.2d 314, 319-20 (5th Cir. 1987); *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7th Cir. 1987); *Donovan v. A. Amorello & Sons*, 761 F.2d 61, 64-66 (1st Cir. 1985). *See also Brock v. Cathedral Bluffs Oil Co.*, 796 F.2d 533, 537, 537 n.2 (D.C. Cir. 1986) (deferring to Secretary over Federal Mine Safety and Health Review Commission in case brought under Federal Coal Mine Safety and Health Act). In contrast, the Second, Fourth, Sixth, Eighth and Ninth Circuits defer to the Commission. *See Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-01 (9th Cir. 1986); *Usery v. Hermitage Concrete*

Pipe Co., 584 F.2d 127, 132 (6th Cir. 1978); *Marshall v. Western Electric*, 565 F.2d 240, 244 (2d Cir. 1977); *Brennan v. OSHRC*, 513 F.2d 713, 715-16 (8th Cir. 1975); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-62 (4th Cir. 1974).

The Secretary cites our decision in *Kesler*, 513 F.2d at 553, for the proposition that this circuit defers to the Secretary's regulatory interpretation over that of the Commission. In *Kesler*, we were faced with a dispute between the Secretary and Commission over the effective date of an abatement order under OSHA and concluded that the Secretary's regulatory interpretation was proper. *Id.* at 558. However, contrary to the arguments advanced by the Secretary in the instant case, this court in *Kesler* did not reach its conclusion merely by adopting the Secretary's reasonable interpretation; we considered the respective views of the Secretary and Commission and found the Commission's interpretation unsupported by the regulatory language. The *result* of *Kesler* should not be mistaken as an endorsement of an approach which always defers to the Secretary over the Commission. For in the subsequent case of *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126, 131 (10th Cir. 1978), we adopted the legal conclusions of the Commission over those proposed by the Secretary. Thus, the question of whether, in the face of conflicting regulatory interpretations, deference properly is accorded to the Secretary or Commission has not been addressed in the circuit.

B.

Statutory authorization for the Occupational Safety and Health Review Commission is provided in 29 U.S.C. § 661. Composed of persons specially qualified "by reason of training, education, or experience," 29 U.S.C. § 661(a), the Commission serves in an adjudicative capacity when-

ever an employer elects to challenge a citation issued by the Secretary. 29 U.S.C. § 659(c). However, as evidenced by the split within the federal circuits, whether the Commission or Secretary is empowered with final interpretive authority over OSHA regulations remains unclear from the statutory language. We therefore consult the legislative history behind the Commission as a "secondary source" to help us determine the Commission's statutory powers vis-a-vis the Secretary. *See Miller v. Commissioner*, 836 F.2d 1274, 1282-84 (10th Cir. 1988) (reliance on legislative history is more justifiable where statute is unclear and legislative history is consulted with specific question in mind). Because the legislative history concerning the Commission's enactment is relatively uniform and clear, such history provides a reliable indicator of Congressional intent and should be accorded weight by this court. *See id.* at 1282.

When first proposed, the Occupational Safety and Health Act vested the power to adjudicate alleged safety violations with the Secretary. *See* S. 2193, 91st Cong., 1st Sess. § 6 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 11-13 (1971) (*Legislative History*). However, in response to business concerns that combining prosecutorial and adjudicative authority in the Secretary would produce decisions biased against employers, Congress created the Commission by adopting a floor amendment which withdrew adjudicative authority from the Secretary. *See id.* at 463-64. Congress envisioned the Commission as an autonomous, independent and quasi-judicial body. *Id.* at 462, 465. Subsequent judicial interpretation has emphasized that the prosecutorial power vested in the Secretary remains separate and distinct from the adjudicative power vested in the Commission. *See, e.g., Cuyahoga Valley Ry.*

v. United Transp. Union, 474 U.S. 3, 7 (1985) (per curiam) (Commission's review of Secretary's decision to dismiss citation constituted an improper encroachment upon the Secretary's prosecutorial prerogative).

Congress sought to endow the Commission with the normal complement of adjudicative powers possessed by traditional administrative agencies. *Legislative History* at 462, 465; *Gilles & Cotting*, 504 F.2d at 1262. Such an adjudicative function necessarily encompasses the power to "declare" the law. *Id.* at 1261-62. Accordingly, where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission. *See Brennan v. OSHRC*, 513 F.2d at 715-16. If the Secretary believes that the Commission has interpreted a regulation in a manner inconsistent with OSHA's goals, it may be necessary to amend or clarify that regulation. *See id.* at 716.

Two circuits rely upon a footnote in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), for the proposition that the Commission's interpretations are not entitled to deference because the Commission is only charged with adjudication. *Schuylkill*, 828 F.2d at 319; *Chicago Zoological*, 820 F.2d at 912. *Potomac Electric* involved an injured worker's claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 901-950. The ALJ and the Benefits Review Board departed from the settled construction of the Act and determined that the injured claimant was entitled to an ongoing recovery. *Potomac Electric* 449 U.S. at 272. The Supreme Court held that the Board's interpretation contravened the plain language of the Act, its legislative history and all prior decisional authority and

consequently reversed the D.C. Circuit's decision upholding the Board's interpretation. *Id.* at 279-80. Included in footnote 18 of the Court's opinion was the following dicta: "It should also be noted that the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Id.* at 278 n.18.

This language makes specific reference to the Benefits Review Board created under the Longshoremen's Compensation Act; it would be presumptuous for us to extend the Supreme Court's language outside the context in which it arose. Moreover, the structural, historical and theoretical differences between the Review Board and the Commission further distinguishes this case from *Potomac Electric*. The Longshoremen's Compensation Act mandates nonaccusatory adjudication of injured workers' claims whereas OSHA requires accusatory proceedings that may result in substantial penalties. While the Commission resulted from Congressional concern that the prosecutorial and adjudicative functions not be vested in one governmental entity, no such concerns are implicated by the Longshoremen's Compensation Act where the prosecutorial function is carried out by a private citizen. The need for a strict separation of prosecutorial and adjudicative functions is therefore far more acute in the case of OSHA than under the Longshoremen's Compensation Act. *Compare Potomac Electric*, 449 U.S. at 278 n.18 (no deference to adjudicative agency in action brought by claimant under Longshoremen's Compensation Act) *with Cuyahoga Valley*, 474 U.S. at 7 (Secretary's prosecutorial function under OSHA must remain separate and distinct from Commission's adjudicative role). *See generally* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 803 (1981).

Although we hold that, under OSHA, deference is properly accorded to the regulatory interpretations of the Commission, we recognize that another result may prevail under a different statutory framework. We further stress that our holding not be construed as a carte blanche for the Commission to overturn settled regulatory interpretations of the Secretary. The Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. Because we find the regulations in the instant case to be ambiguous, we defer to the interpretation enunciated by the Commission, insofar as it is reasonable.

III.

Employee exposure to coke oven emissions is governed by 29 C.F.R. § 1910.1029. Generally, compliance with permissible exposure limits may not be achieved by the use of respirators except in limited cases where abatement is not technologically feasible. 29 C.F.R. § 1910.1029(g)(1). Where respirators are necessary, however, the employer shall select, provide and assure the use of the appropriate respirator based upon the airborne concentration of coke oven emissions. *Id.* With respect to training and testing of respirators, OSHA regulations provide in pertinent part:

> (3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.
>
> (4) *Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

29 C.F.R. § 1910.1029(g)(3), (4). The incorporated § 1910.134, entitled "Respiratory Protection," contains

general regulations governing respirator use in all industries and includes a discussion of atmospheric testing:

> For the safe use of any respirator, it is essential that the user be properly *instructed* in its selection, use, and maintenance. Both supervisors and workers shall be so *instructed* by competent persons. *Training* shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

29 C.F.R. § 1910.134(e)(5) (emphasis supplied). The Secretary argues that the incorporation of § 1910.134 into § 1910.1029(g)(3) mandates atmospheric testing to insure the proper fit of each employee's respirator. Conversely, the Commission held that § 1910.134(e)(5) is merely a training standard only applicable when teaching employees how to apply their respirators, not a testing standard to insure proper fit.

Safety legislation is to be liberally construed to effectuate the congressional purpose of improving health and safety in the workplace. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). Moreover, OSHA regulations provide that general standards supplement specific ones by filling those gaps remaining after the promulgation of specific standards. *Texas E. Prod. Pipeline Co. v. OSHRC*, 827 F.2d 46, 49 (7th Cir. 1987); 29 C.F.R. § 1910.5(c). Nevertheless, it cannot be said that the Commission's interpretation of § 1910.1029(g)(3) in this case was unreasonable. The plain wording of the incorporated § 1910.134(e)(5) prescribes that atmospheric testing is mandated in the "training" of employees. The Commission therefore concluded reasonably that CF&I was not required to utilize ongoing atmospheric testing to insure the proper fit of

each employee's respirator. While it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language contained in 29 C.F.R. §1910.1029, we defer to the interpretation chosen by the Commission. If the Secretary maintains that a different result should prevail under OSHA, she should amend or clarify these regulations through the rulemaking process.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2641
(OSHRC No. 79-4786)

ELIZABETH H. DOLE, SECRETARY OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

CF&I STEEL CORPORATION, INTERVENOR RESPONDENT

JUDGMENT
Entered December 22, 1989

Before: MOORE and BALDOCK, Circuit Judges and DAUGHERTY, District Judge.*

BALDOCK, Circuit Judge.

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* The Honorable Frederick A. Daugherty, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

This cause came on to be heard upon petition for review of an order of the Occupational Safety and Health Review Commission. The matter was heard on the administrative record of the Occupational Safety and Health Review Commission and was argued by counsel.

Upon consideration whereof, it is ordered that the order of the Occupational Safety and Health Review Commission is affirmed. Accordingly, the petition for review is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1825 K STREET, N.W.
4th FLOOR
WASHINGTON, D.C. 20006

OSHRC Docket No. 79-4786

SECRETARY OF LABOR, COMPLAINANT

v.

CF&I STEEL CORPORATION, RESPONDENT

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
LOCAL 2102, AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION

BEFORE: BUCKLEY, Chairman; RADER and WALL, Commissioners.

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The Commission is an adjudicatory agency, independent of the Department of Labor and the Occupational Safety and Health Administration ("OSHA"). It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the Act and has no regulatory functions. *See* section 10(c) of the Act, 29 U.S.C. § 659(c).

CF&I Steel Corporation ("CF&I") operates a steel plant near Pueblo, Colorado. At this plant, CF&I also operated a coke oven facility to produce coke for use in its steelmaking. Following an inspection of its coke oven facility, several citations were issued to CF&I that alleged violations of the coke oven emissions standard. CF&I contested these citations and the case was assigned to former Administrative Law Judge Quentin P. McColgin, Jr. After a hearing on the merits, the judge affirmed some citations and affirmed some in part. CF&I and the authorized employee representative, the United Steelworkers of America, AFL-CIO, Local 2102 ("the Union") obtained review of the judge's decision.[1]

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[1] CF&I ceased operations at this coke plant on or about December 31, 1982. While this case was pending on review, we granted the Secretary's motion to withdraw a citation in another case involving this employer. *CF&I Steel Corp.*, OSHRC Docket No. 81-454. Our order in that case was based in part on the Secretary's assertion that he was "informed by counsel for [CF&I] and the authorized employee representative that [CF&I] has permanently ceased operation of its coke oven facility in [Pueblo, Colorado.]" In a notice filed with all parties in this case, we requested information on: (1) whether the coke ovens involved here had ceased operations; (2) whether the abatement requirements of these citations were moot; and (3) what issues, if any, remained in dispute. By joint stipulation of the parties, we were informed that the coke oven facility cited in the case has ceased operation and that CF&I had "no intention" of resuming operations in the "forseeable future." The parties also stipulated the abatement requirements of the citations were moot but that "[t]he citations upon review, themselves, and the corresponding penalties are the only issues subject to continuing dispute."

Background

1. *CF&I's Coking Operation*

CF&I produced coke in three adjoining batteries: Battery B, containing 65 ovens, was located at the south end of the configuration; Battery C, containing 47 ovens, was in the middle; and, Battery D, containing 31 ovens, was on the north end. Each oven contained in the batteries was approximately 2 feet wide, 20 feet high and 120 feet long. Pinion walls, made of masonry, were located at the ends of each battery. These pinion walls extended vertically from ground level and served as structural supports for the series of ovens contained within each battery. The pinion walls ranged in width from three to six feet thick. Intermediate pinion walls were located between batteries B and C and between C and D. The outer pinion walls were at the ends of batteries B and D. There were coal bins or bunkers adjacent to and beyond the outer pinion walls on the north and south ends of the batteries. Door repair shops were also located beyond the outer walls, below the coal bins on what is known as the "bench level" of the battery.

The coking cycle begins with the introduction of coal into the coke oven. This procedure, called charging, is carried out by a larry car which operates on rails that run the length of the top or "topside" of the battery. The larry car receives coal from one of the coal bins or bunkers located south of the outer pinion wall on Battery B and north of the pinion wall on Battery D. The larry car then moves along topside to the oven to be charged, the lids on the tops of ovens are removed, and the coal is dropped into the oven.

After the lids are replaced, the coal is heated for 16 to 20 hours at approximately 1100° C (2000° F). When the coal is coked, it is then ready to be pushed from the oven. Doors on both sides of the oven, the "push side" and the "coke

side," are removed. A "pusher machine" then travels along tracks on the "push side" of the battery and uses a mechanical ram to push the coke into the quench car, located on the tracks on the "coke side" of the oven.

The coke is then removed from the battery area, cooled, and transferred to the coke wharf. It then is stored for use in steelmaking. After the push, the oven doors on both sides of the battery are inspected to determine whether their emission-limiting seals have been damaged during the coking. Damaged doors are returned to one of the door repair shops located below the coal bunkers at bench level.

2. *OSHA's Coke Oven Emissions Standard*

The coke oven emissions standard was adopted by OSHA after extensive rulemaking proceedings. It was published on October 22, 1976, and became effective on January 20, 1977. 41 Fed. Reg. 46,742-90 (1976). The standard that finally was adopted was published with an extensive preamble. The preamble explained the standard, discussed how it differed from the standard originally proposed, and summarized the comments received during the notice-and-comment rulemaking proceedings.

The final standard requires employers to establish engineering controls and work practices to reduce employees' exposure to coke oven emissions to 150 micrograms per cubic meter (150 ug/m^3) averaged over any eight-hour period. This 150 ug/m^3 permissible exposure limit (PEL) may not be exceeded in specific "regulated areas" on and near the battery. Although other standards regulating toxic and hazardous substances in Subpart Z of 29 C.F.R. Part 1910 use the term "regulated area," the coke oven emissions standard is unique in its definition of the term. It identifies specific work areas on the coke oven battery as regulated areas. In contrast, other standards in Subpart Z define a "regulated area" as one where the substance being

regulated is "manufactured, processed, used, repackaged, released, handled or stored," *e.g.*, 29 C.F.R. §§ 1910.1003-1910.1016, or where employee exposure to the substance in question exceeds the PEL for that substance. *E.g.*, 29 C.F.R. §§ 1910.1018, 1910.1044, 1910.1045, 1910.1047. This decision not to define a "regulated area" on the basis of ambient coke oven emission levels was deliberate.[2]

The coke oven emissions standard also provides that if the prescribed engineering and work controls do not reduce emission levels in the regulated area to the PEL, employers must supply employees with respirators. The preamble to the coke oven emission standard states that the fit of respirators is to be tested qualitatively and quantitatively. 41 Fed. Reg. 46,773-74. Respirator fit testing was discussed extensively by the parties in this case. The record shows that a qualitative fit test is subjective in that leakage is detected by the wearer of the respirator. A quantitative fit test is more precise in that leakage is measured by an instrument that compares the contaminant level inside and outside the respirator face piece. The preamble confuses these tests and describes qualitative testing as quantitative testing. 41 Fed. Reg. 46,774.

[2] The final standard's treatment of regulated areas differs significantly from the approach of the standard originally proposed by the Secretary. 40 Fed. Reg. 32,268-77 (1975). The originally proposed regulated area provision did not mention the battery ends or the screening station. The preamble does not explain why "battery ends" was added to the final standard. It does state generally that all areas specified as "regulated areas" in the final standard were associated with increased health risk. 41 Fed. Reg. 46,756 (1976). In addition to designating specific work areas as regulated areas, the proposed standard also provided that a regulated area be established in "any other coke plant work area where the permissible exposure limit is exceeded." The preamble to the final standard stated that this approach to designating regulated areas was deleted because "[a]ny area where the permissible exposure limit could be exceeded, would, by definition already be a part of the [regulated area]. 41 Fed. Reg. 46,757. It is quite clear therefore that under the final standard, regulated areas must be designated in specific work areas and *not* by reference to whether the PEL is exceeded.

The validity of the coke oven emissions standard was challenged in the United States Court of Appeals for the Third Circuit by several members of the coke-producing industry, including CF&I. The Third Circuit generally upheld the validity of the standard; however, the provision of the standard that required annual "quantitative testing" of respirators, which bears on our resolution of one citation here, was invalidated by the court. *American Iron and Steel Institute v. OSHA*, 577 F.2d 825, 838-9 (3d Cir. 1978) ("*AISI*"). OSHA subsequently amended the standard to delete the quantitative fit test requirement. 50 Fed. Reg. 37,352-54 (1985).

3. *Enforcement of the standard at CF&I's plant*

During review of the standard, the Third Circuit lifted a temporary stay of enforcement of the standard. During May and July of 1977, OSHA inspected CF&I's coking operation. As a result of the inspection, CF&I was cited for several violations of the coke oven emissions standard. The parties entered into a settlement agreement that resolved all disputed issues. This settlement was approved by the Commission and became a final order on June 14, 1979.

On August 1, 1979, after the abatement date agreed upon in the settlement had passed, OSHA conducted a follow-up inspection to determine if the previously cited conditions had been abated. As a result of the follow-up inspection, OSHA issued the citations now before us.

Citation 1: 29 C.F.R. § 1910.1029(d)(2)(i), "Battery Ends"

The citation alleges that CF&I violated section 1910.1029(d)(2)(i) by failing to establish certain areas and machinery of the coke plant as "regulated areas." These were the topside north and south coal bin areas, the bench level north and south door repair facility, and nos. 1-3 push cars and larry cars. Section 1910.1029(d)(2)(i) provides:

> (d) *Regulated areas.*
>
> * * *
>
> (2) The employer shall establish the following as regulated areas:
>
> (i) The coke oven battery including topside and its machinery, pushside and its machinery, coke side and its machinery, *and the battery ends*; the wharf; and the screening station;

(Emphasis added.)

There is no dispute that CF&I did not establish the north and south coal bin areas and the north and south door repair facilities as regulated areas. As already noted, these cited areas were beyond the outermost pinion walls. There also is no dispute that the larry cars and push cars were not designed as regulated areas when located beyond the pinion walls. The parties do dispute, however, whether the cited work areas and machinery are part of the "battery ends" and, thus, part of the regulated area. As we have already noted, if an area or machinery is designated as a "regulated area," employees in the area may not be exposed to coke oven emissions in excess of the 150 ug/m[3] PEL, and the employer must take other protective measures, including medical surveillance and provision of protective equipment.[3]

[3] The standard required employers to provide quarterly monitoring of the exposure levels of employees in the regulated area, § 1910.1029(d)(i) and (iii), and monthly medical surveillance for these

1. *Facts*

Compliance officer Gerald Ryan conducted the initial inspection as well as the follow-up inspection that resulted in the present citations. Based on conversations with CF&I's management and his review of CF&I's records, Ryan determined that CF&I "no longer" considered the cited areas to be regulated areas. It appears that when the initial inspection was conducted, the cited areas were designated as regulated areas by CF&I. Compliance officer Ryan thought that CF&I had misinterpreted OSHA's "respirator break" policy, described in OSHA Instruction STD 1-4.3, and that as a result, it had deregulated areas on the battery where emissions sampling showed that the PEL was not exceeded.[4] These deregulated areas were described

employees, § 1910.1029(j)(1)(i). Employees who work in the area must wash their hands and face before eating, and shower at the end of their shift. Section 1910.1029(i)(2)(i) & (i)(4)(i). These employees also must be trained regarding the hazards of emissions and the protective measures required by the standard. Section 1910.1029(k)(1)(i). Smoking and drinking are prohibited in the regulated areas. Section 1910.1029(i)(5)(i).

[4] Instruction STD 1-4.3 was issued on April 19, 1979, approximately three months before this inspection. 1978-79 CCH Developments Binder ¶ 11,678. Its purpose was to "clarify the compliance procedures for determining an effective respirator program for the coke oven emissions standard." This instruction states in part:

> 1. At this time any employee in the regulated area must wear a respirator except in the lunch rooms or in filtered air locations and except as provided below.
>
> a. Employees in the regulated area need not wear a respirator in clearly delineated areas that have been shown by air sampling to be consistently below the permissible exposure level (PEL) of 150 ug/m[3] (8 hour TWA). Such locations may include large areas, such as the push side bench or small areas, such as the bench level between batteries.

The instruction also states that due to the discomfort and inconvenience associated with wearing a respirator, wearers could remove res-

by CF&I as "respirator break areas." In Ryan's view, respirator break areas were still part of the regulated area.

John Winkley, CF&I's Manager of Air and Water Quality Control, and James Oliver, assistant superintendent of the Coke Plant, testified that the steelmaking industry considered the "battery end" to be the pinion wall. Winkley stated: "[t]o my knowledge, the ends of the batteries are defined by the location of the pinion walls at the end of the series of [coke] ovens." His definition was based on his engineering experience and conversations "with other coke plant operating personnel." According to Oliver, "[t]he end of the battery is customarily defined as being . . . the pinion walls, the extremity of the pinion wall." Oliver's definition was apparently based on observation of numerous batteries.

Winkley and Oliver also testified that the coal bin and the door repair facility were not included in the regulated area because they were "beyond the ends of the battery." According to assistant superintendent Oliver, these areas were also designated as "respirator break areas" because sampling in these areas showed that emissions were "consistently" below the PEL. CF&I required employees in the cited "respirator break areas" to wear protective clothing. Respirators were to be worn only in the presence of visible emissions. The consumption of food and drinks was prohibited in these areas but smoking was allowed.

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pirators for a "brief rest period" or for "essential work conversations" in areas that were not below the PEL so long as the respirator was worn for a sufficient period to reduce exposure below the PEL. Finally, the instruction states the following regarding "battery ends":

> Battery ends include, but are not limited to, the coal loading area between batteries on topside and bench level (and not just pinion wall to pinion wall). In general, all parts of the battery above ground level are within the regulated area.

The parties did not focus very closely on whether CF&I was required to designate the cited push cars and larry cars as regulated areas. The compliance officer testified that this machinery should have been designated as regulated areas when located beyond the pinion walls because it was contaminated with coke oven emissions when present on the battery. Assistant superintendent Oliver stated that when the cited cars were not in use or were being repaired, they were beyond the pinion walls and therefore not considered part of the regulated area. He stated that when these cars were within the battery walls they were considered part of the regulated area.

2. *The judge's decision*

The judge concluded that CF&I had violated the standard by failing to designate the cited locations and machinery as regulated areas. Although the judge found that "[t]he battery end is considered throughout the industry to be the pinion wall," he concluded that the Secretary did not use the term in the sense understood by industry and therefore that facilities and machinery located beyond the pinion walls must be considered part of the regulated area.

Based on an aerial photo of the coke plant, the judge reasoned that "anyone, except possibly a member of the coke oven industry" would consider CF&I's series of coke batteries as a "single structure." Because of the proximity of the cited areas to the coke ovens, he concluded that these areas should be considered part of the "battery ends" and therefore a regulated area.

Citing the preamble to the standard, the judge further found that "[i]t [was] the express intention of the promulgators of the standard to include within the regulated areas, all work areas wherein the permissible exposure limit to coke oven emissions could be exceeded." Although

he found no evidence of sampling results taken at the door repair facilities and coal bins, the judge did find that samples taken in the immediate vicinity of these areas approached or exceeded the PEL. *See* note 5, *infra*. He concluded that the PEL "could" have been exceeded in these locales and, thus, that they should have been designated as regulated areas. He also found that a statement in the preamble—that "[t]he larry car receives a load of coal from the coal bunker at the end of the battery"—provided "[m]ajor support" for concluding that, in using the term "battery ends," OSHA intended to include facilities beyond the pinion walls, such as coal bunkers, as part of the regulated area.

The judge rejected CF&I's argument that the larry cars and push cars should not be considered part of the regulated areas when positioned beyond the pinion walls. According to the judge, this machinery could be contaminated by coke oven emissions even when moved beyond the pinion walls. Without explanation, he concluded that there was "need for some, but not necessarily all, the protective requirements that come into play by designating the machines as regulated areas."

3. *The parties' arguments*

CF&I argues that the judge's broad interpretation of the term "battery ends" is contrary to the industry's definition of the term and violates the rule of construction that the words of a regulation should be given their "commonly understood" meaning. In this regard, CF&I points out that the judge explicitly found that "[t]he battery end is considered throughout the industry to be the pinion wall."

According to CF&I, the other reasons advanced by the judge for broadly interpreting the term "battery ends" are unfounded. CF&I first argues that the judge's finding that the battery "looks" like a single structure represents a lay-

man's view of the structure that disregards industry's view. It next contends that, contrary to the judge's findings, the preamble does not provide support for a broad interpretation of the term "battery ends." CF&I concedes that the preamble does state that "coal bunkers" are located at the "end of the battery" but argues that this statement was taken out of context by the judge and that it merely reflected a very general statement used in discussing the coking process and not a definition of the term "battery end."

CF&I next contends that section 1910.1029(d)(2) specifically enumerates the areas that must be regulated under the standard. It asserts that the judge misread the standard by finding that a regulated area exists wherever the PEL could be exceeded. CF&I asserts that this approach to designating a regulated area was not followed in the final standard and cites the language from the preamble in support. In any event, CF&I contends that the record contains sampling results from both door repair facilities and that these results were both below the PEL.

The union argues that the pinion walls are not the "battery ends." It asserts that "if the Secretary had intended the regulated area to be defined by the pinion wall[,] that is what the regulation would have said since that is the term used by the industry." In the union's view, "battery ends" refers to the area and structures attached to the pinion walls that contain the cited coal bins and door repair areas. The union points out that the pinion walls are three to six feet thick and that they are not work areas.

Relying on the preamble, the union further asserts that OSHA excluded areas on and near the battery from the regulated area coverage only where there was no epidemiological evidence of excess health risk. It contends that the preamble and standard require that certain job classifications must be monitored quarterly because they are associated with excess health risks. Since certain of the employees

in these positions – such as coke oven patchers, repairmen, and maintenance personnel – work on the batteries as well as in cited areas beyond the pinion walls, it submits the cited areas should also be considered part of the regulated area. The union also argues that evidence showing that the PEL could be exceeded in the disputed areas demonstrates the need for establishing these areas as regulated.

Finally, the union contends that even if the Commission narrowly construes "battery ends" as pinion walls and concludes that the door repair facilities and coal bunkers were not regulated areas, the citation must be affirmed as to the cited larry cars and push cars because the standard requires "topside and its machinery [and] pushside and its machinery" to be established as regulated areas without reference to the "battery ends."

Although the Secretary concedes that the term "battery ends" has no plain meaning and is undefined by the standard, he submits that language contained in the preamble to the coke oven standard demonstrates that it was OSHA's "clear intention" to include facilities and machinery located beyond the pinion wall within the regulated area. Like the union, the Secretary contends that the preamble's statement that "[t]he larry car receives a load of coal from the coal bunker *at the end of the battery*" (emphasis supplied by the Secretary) demonstrates the intent to include areas such as the coal bunkers within the regulated areas. He further asserts the preamble and the standard's definition of regulated area show that OSHA intended to include large areas on and near the battery in the regulated area and not a three-to-six-foot wide wall. According to the Secretary, a broad interpretation of battery ends also is appropriate because CF&I's sampling results show that coke oven emissions "can and do exceed the [PEL] in areas beyond the pinion walls." He points out

that CF&I recognized that the disputed areas and machinery were part of the regulated area because, prior to the issuance of OSHA Instruction Std. 1-4.3 (*see* note 4, *supra*) and when the initial inspection of its facility was conducted, CF&I had designated these areas as regulated areas. Finally the Secretary argues that his construction of the standard should be controlling because it is reasonable.

4. *Discussion*

To determine whether CF&I violated the standard by failing to establish the door repair and coal bin areas as "regulated areas," we must determine whether they were part of the "battery ends." In construing the standard, we are mindful of several principles. We must look first to the language of the standard. *See Bunge Corp.*, 86 OSAHRC ____/____, 12 BNA OSHC 1785, 1789, 1986 CCH OSHD ¶ 27,565, p. 35,804 (No. 77-1622, 1986), and cases cited. Second, although legislative history and other extrinsic aids to interpretation may be used to determine the intent of the drafter, standards should be construed in a way that does not deprive employers of fair notice of the requirements of the law. *See id.*, 12 BNA OSHC at 1790-91, 1986 CCH OSHD at p. 35,806, and cases cited. *See also Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1119 (10th Cir. 1977); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161-162 (3d Cir. 1978); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976); *Lisbon Contractors, Inc.*, 84 OSAHRC 19/A2, 11 BNA OSHC 1971, 1973-74, 1984 CCH OSHD ¶ 26,924, p. 34,500 (No. 80-97, 1984). We find that the language of the standard and its legislative history shed no light on the question before us, and that the construction of the standard for which the Secretary argues would deprive employers of the fair notice of their obligations that due process of law re-

quires. We therefore construe the term in the manner that this record shows it is understood by the coke oven industry.

The standard does not define the term "battery ends." Moreover, as the Secretary observes, the term has no plain meaning. Yet, the judge found, and neither the Secretary nor the union disputes, that "[t]he 'battery end' is considered throughout the industry to be the pinion wall." The judge and the parties have, however, looked to other sources as interpretive aids.

A.

Relying on the preamble to the standard, the union and the Secretary argue, and the judge found, that OSHA intended to establish regulated areas wherever the PEL for coke oven emissions was exceeded. Because of the proximity of the cited areas to the coke ovens and because CF&I's monitoring data purportedly showed that the PEL "could be exceeded" in the cited areas, the judge determined that the cited areas should be considered regulated areas.

This argument is directly contrary to the legislative history of the standard. The portion of the preamble relied on by the Secretary, the union, and the judge states:

> Both the proposed standard and the Advisory Committee report also established "any coke plant area where the [PEL] is exceeded as an RA [regulated area] (Ex. 1a, p. 322278; 3, p. 15). *The final standard does not follow that approach.* The permissible exposure limit of this standard only applies in the RA. (See discussion of Permissible Exposure Limit). Any area where the permissible exposure limit could be exceeded, would, by definition already be a part of the RA.

> Areas of the coke plant outside of the RA are covered by the existing CTPV standard. (See discussion of Scope and Application).

41 Fed. Reg. at 46,757 (emphasis supplied). As can be seen from this excerpt, regulated areas under the final standard were to be established by work areas and *not* by whether the PEL is or "could be" exceeded. Although the approach followed by the judge and urged by the Secretary and the union is consistent with the proposed standard and with other OSHA health standards, it is clearly inconsistent with the coke oven emissions standard as finally adopted. *See* note 2, *supra*. Finding the preamble very clear on this point, we must reject this basis for concluding that the cited areas are encompassed by the term "battery ends." [5]

We also do not find that the preamble's isolated statement that coal bunkers are "at the end of the battery," provides "[m]ajor support" for concluding that, in using the term "battery end," the Secretary intended to regulate facilities beyond the pinion walls. This statement is contained in a general description of a typical coking operation and clearly is not definitional. It is the only instance

[5] Based on this record, it is far from clear whether the PEL was consistently exceeded in the cited area. Relying on Exhibit C-22, the judge stated that no sampling results were produced for either the door repair or coal bin areas but that samples taken in the north and south lunchrooms "could" and did exceed the PEL. Contrary to what the judge found, there are sampling results in evidence for the north and south door repair areas. See Exhibit R-70. These results show that on four separate dates in the latter part of 1979, the door repair facilities were sampled. Of the 16 samples reported, none exceeded the 150 ug m³ PEL — the highest being 123 ug m³. These records also show that the north and south lunch rooms were sampled 24 times between April, 1979 and December, 1979. Although a sample taken at the south lunchroom was 280 ug m³, as found by the judge, the remaining 23 samples were below the 150 ug m³ PEL with 16 of this total below 50 ug m³.

of such usage in the 43-page, triple-columned preamble to this standard. We decline to wring an inference of intent from such an offhand and isolated statement.

OSHA Instruction STD 1-4.3, a policy directive on respirator programs for coke oven batteries, see note 4, *supra*, also fails on this record to convincingly show an intent by the drafters to encompass areas beyond outer pinion walls within the "battery ends." This directive discusses at length when "respirator break areas" may be established in a regulated area. In discussing that subject, it also states that:

> Battery ends include, but are not limited to, the coal loading area *between* batteries on topside and bench level (and not just pinion wall to pinion wall). In general, all parts of the battery above ground level are within the regulated area.

(Emphasis added.) This brief passage cannot be said on this record to be controlling. First, the record here contains no evidence that OSHA Instruction STD 1-4.3 reflects the intent of the drafters of the coke emissions standard. The instruction was issued over three years after the standard was published. Neither the instruction nor the record shows, and the Secretary's brief does not represent, that the drafters of the instruction were also the drafters of the standard or that they consulted with the standard's drafters. Like the respirator break-area policy it established (see note 4, *supra*), the instruction's discussion of the term "battery ends" was only a brief digression from the rest of the instruction, and could well have been only an afterthought by enforcement personnel. Second, the instruction does not address the situation posed by the facts of this case. Although the instruction states that battery ends include coal loading areas outside pinion walls, the battery ends being discussed are those *between* batteries, a

configuration that is far different than that existing at CF&I's plant. At best, this view would mean that coal loading areas between operating coke ovens would be regulated. It provides no support, however, for an argument that the term "battery ends" encompasses exterior coal loading areas beyond the outer pinion walls. Indeed, the very fact that the instruction stated that interior coal loading areas were within the battery ends, but did not say the same about exterior coal loading areas, would tend to indicate that the author of the instruction understood that the standard did not encompass exterior coal loading areas.

We also decline to ascribe significance to the interpretation of the standard proffered in the brief submitted by the Secretary. This standard is one of the few standards that was drafted by OSHA.[6] Inasmuch as the intent of OSHA in drafting the standard must be considered along with considerations of fair notice in construing the standard, we cannot ignore the construction placed on a standard by those in OSHA who drafted it. Such a construction would obviously have considerable probative value in determining the effect of the standard. However, the brief does not represent that it was written or reviewed by lawyers who consulted with the drafters of the standard or participated in the drafting of the standard. *See New England Telephone & Telegraph Co. v. Public Utilities Commission,*

[6] The vast majority of the standards adopted under the Act were drafted by private organizations rather than by OSHA. OSHA was required by section 6(a) of the Act to adopt privately-drafted standards without substantive change. See note 12 *infra* and accompanying text. Many of the standards that had been drafted by OSHA or the old Bureau of Labor Standards and adopted under section 6(a) of the Act as established federal standards were also derived largely from privately drafted standards. *See generally Dun Par Engineered Form Co.*, No. 79-2553 (July 30, 1986) (slip op. at 11, 14 & n 10, surveying the history and derivation of OSHA standards).

742 F.2d 1, 11 (1st Cir. 1984) (on rehearing) ("[The FCC's] 'views' here do not reflect agency policy reached after debate[] among staff or commissioners. Rather, as far as we can tell, they simply represent the General Counsel's interpretation of the statute; they are contained only in his brief."). *Cf. Investment Company Institute v. Camp*, 401 U.S. 617, 626-28 (1971)(counsel's efforts in litigation are "hardly tantamount to an administrative interpretation" of a statute).

Finally, we cannot agree with the judge's view that the cited areas are part of the battery ends because the coke oven facility – extending from the north door repair and coal bin area to the south door repair and coal bin areas – "looks like a single structure." Acknowledging that he was adopting the "single structure" interpretation advanced by the Secretary and the union, the judge found that "[a]nyone, except possibly a member of the coke oven industry . . . would likely view such facilities as one structure. . . ." As CF&I points out, however, the judge's interpretation is based on a layman's view of its facility. Neither the judge's observation as to the physical continuity of the facility nor his resultant interpretation of the term "battery" ends reflects industry's understanding or usage of this term, but instead employs an untutored observation to supplant the meaning of a term that is well-understood by individuals who are intimately familiar with coking operations and who, ultimately, are responsible for complying with the standard. Given the unrebutted evidence that industry considered the battery ends to be the pinion walls, we cannot adopt an interpretation that is based solely on the appearance of a coke oven to an untutored eye.

B.

We shall therefore apply the usual canons of construction here. Two well-settled rules of interpretation guide our decision. The first rule is that a word that is a term of art in a particular discipline should be construed accordingly where the statute or regulation being construed applies to the particular discipline. *Corning Glass Works v. Brennan*, 417 U.S. 188, 201, 94 S.Ct. 2223, 2231 (1974). *See United States v. Cuomo*, 525 F.2d 1285, 1291 (5th Cir. 1976), and cases cited therein. *See also* 2A C. Sands ed., *Sutherland on Statutory Construction* §§ 45.08 at 23, 47.7 at 137, 47.29 at 150 (1973). The second rule is that which we have noted above – that standards ought not be construed in a manner that deprives employers of fair notice of the requirements of the law.

The record here amply demonstrates that the only individuals who readily understood the term "battery ends" were coke producers. They considered the "battery ends" to be the pinion walls. The Secretary and the union argue that the coke producers' reading of these terms yields an incongruous result because employers would then be required to designate a three-to-six-foot wide wall as a regulated area. However, given the rather formidable evidence of industry's understanding of this term and OSHA's failure to inform employers that it intended this term to be applied in a different sense, it is inappropriate to construe "battery ends" in a sense that differs from industry's understanding of the term. As already stated, employers are entitled to fair notice of their responsibilities under the Act. Standards cannot be construed to mean what an agency intended but did not adequately express. *Diamond Roofing*, 528 F.2d at 649. "The test is not what [the Secretary] might possibly have intended but what he said." *Bethlehem Steel*, 573 F.2d at 161. As

Justice Frankfurter observed with regard to the interpretation of statutes:

> Even when it has spoken, it is as true of Congress as of others that what is said is what the listener hears.

Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527 (1947). Here, the record shows that when OSHA said "battery ends," the employer heard "pinion walls" because its industry considers these terms synonymous and because OSHA gave the industry no notice in the standard that the term was not used in the sense it understood.

The Secretary asserts that CF&I heard and understood precisely what he claims OSHA intended by "battery ends" because the record also shows that the cited areas and equipment had at one time been designated as regulated areas. It appears that when CF&I was first inspected by OSHA in 1977, the cited areas and equipment were designated as regulated areas; however, following this inspection, CF&I departed from this policy. The assistant superintendent of the coke plant, Oliver, testified that some time after the standard was promulgated, on a date that he could not recall, a determination was made that the cited areas were not part of the regulated area. This evidence, it is submitted to us, demonstrates that the employer understood precisely what the standard required.

An employer who is actually aware of a standard's requirements may not claim that the standard fails to provide adequate notice of its requirements. *See Diebold, Inc. v. Marshall,* 585 F.2d 1327 (6th Cir. 1978). We do not, however, find that evidence that the cited areas were once designated as regulated areas is sufficient to overcome CF&I's and the coke oven industry's contrary interpretation in this case.

Accordingly we find that the standard does not require areas beyond the outermost pinion walls to be designated as regulated areas, and we reverse the judge's finding of a violation.

We next consider whether CF&I violated the standard by failing to designate the push cars and larry cars as designated areas. Neither the parties nor the judge focused closely on this aspect of the citation. The record shows that CF&I considered these cars part of the regulated areas when they were between the pinion walls. They were not designated as regulated areas when they were positioned beyond the pinion walls, in the vicinity of the door repair and coal bin areas. The judge found that CF&I violated the standard by failing to regulate these cars because they "could be expected to be contaminated with coke oven emissions even when they have been moved beyond the pinion walls . . . ." Without elaborating, he noted, "there is need for some, but not necessarily all, the protective requirements that come into play by designating the machines as regulated areas."

We reject the judge's adoption of an intermediate position – declaring that some but not all of the protections applicable to regulated areas shall apply when machinery is beyond the outer pinion walls. The Commission cannot construe this standard to require less or more than the protections imposed by its words without substituting its view of occupational health policy for that of the Secretary. *See generally Lisbon Contractors,* 11 BNA OSHC at 1973, 1984 CCH OSHD at p. 34,500. The question is instead controlled by the language of the standard and the standard's definition of "coke oven battery."

In describing the machinery that is to be included in the "regulated area," the standard refers to "[t]he coke oven battery including topside and its machinery, push side and its machinery, coke side and its machinery . . . ."

Although the standard thus refers to coke oven machinery such as the larry cars and push cars, it does so in connection with the topside, the pushside and the coke side. The standard does *not* state that the larry cars and push cars are themselves "regulated areas" when they are no longer in the coke oven battery—defined by section 1910.1029(b) as "a structure containing . . . slot-type coke ovens"—or the battery ends. We therefore find that the judge erred in concluding that the standard required this machinery to be regulated when positioned beyond the pinion walls.

Here the record shows that CF&I treated the machinery as part of the regulated area when it was positioned between the outer pinion walls on the three batteries operated at its facility, Batteries B, C, and D. This is all that the terms of the standard require. Accordingly, we vacate the portion of the citation alleging that CF&I violated this standard by failing to designate this machinery as regulated areas.

Citation 2: Sections 1910.1029(g)(3) and 1910.134(e)(5), Respiratory Program.

CF&I was also cited for a violation of 29 C.F.R. § 1910.1029(g)(3), which incorporates by reference 29 C.F.R. § 1910.134.[7] The citation alleges that:

[7] Section 1910.1029(g)(3) provides:

§ 1910.1029 *Coke oven emissions.*

* * *

(g) *Respiratory protection.*

* * *

(3) *Respiratory program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

* * *

The employer did not institute a respiratory protection program in accordance with 1910.134 of this part, in that: respirator training did not provide the men an opportunity to have their respirator fitted properly and test its face-piece-to-face seal:

a) 28 coke oven employees working in the regulated area exposed to coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.

* * *

The specific provision of the respirator standard that allegedly was violated is section 1910.134(e)(5), which states:

§ 1910.134 *Respiratory protection.*

* * *

(e) *Use of respirators.*

* * *

(5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

Compliance officer Ryan testified that before they were assigned to the regulated areas, CF&I employees were given a respirator, told when to use it, and shown how to perform a positive-negative pressure test.[8] They were also

[8] Section 7.5 of ANSI Z88.2-1969, entitled "Practices for Respiratory Protection," explains how to test for facepiece leakage

shown a film illustrating the various types of respirators, their use and proper function, use of a banana oil (isoamyl acetate) atmosphere for fitting, and how to place and fasten a respirator properly, including tightening for good fit. Ryan testified that CF&I also gave the employees a banana oil test. Ryan stated that at the settlement conference that followed his 1977 inspection, he told CF&I that respirators should be fitted in banana oil or irritant smoke. He testified that the training film shown to newly hired CF&I employees stated that if an employee detected the presence of banana oil, a new respirator would be supplied. During the inspection, Ryan learned that this was not being done. He stated that CF&I's plant superintendent and safety director told him that employees who detected banana oil while wearing their respirators in the test atmosphere[7] were nevertheless sent to work in the regulated area without being fitted with a different

with a positive or negative pressure test. It states:

> (1) Positive Pressure Test. Close the exhalation valve and exhale gently into the facepiece. The face fit is considered satisfactory if a slight positive pressure can be built up inside the facepiece without any evidence of outward leakage of air at the seal. For most respirators, this method of leak testing requires that the wearer first remove the exhalation valve cover and then carefully replace it after the test.
>
> (2) Negative Pressure Test. Close off the inlet opening of the canister or cartridge(s) by covering with the palm of the hand(s) or by replacing the sealing inhale gently so that the facepiece collapses slightly, and hold the breath for ten seconds. If the facepiece remains in its slightly collapsed condition and no inward leakage of air is detected, the tightness of the respirator is probably satisfactory.

A test atmosphere is "an enclosure in which (1) the user can exist with the equipment on, and (2) a test contaminant of sufficient can be placed." NIOSH, *Respirator Protection* [illegible] to Employees, *Manual*, at 76 (1976).

respirator. According to Ryan, CF&I's management told him that this practice was followed throughout the coke oven industry. Ryan also stated that records supplied to OSHA by CF&I's industrial hygiene staff showed that prior to the inspection, twenty-eight employees, who worked in the regulated area, smelled banana oil while wearing respirators in a test atmosphere but were not supplied with different respirators.

In his brief, the Secretary argues that section 1910.134(e)(5), as incorporated by section 1910.1029(g)(3), requires the employer to assure that the respirators worn by its employees are "fitted properly." He maintains that a qualitative fit test conducted in a test atmosphere of irritant smoke or banana oil is required. If the employee fails the test because he can detect the substance surrounding the respirator, the Secretary states that the employer must then provide the employee with a properly fitting respirator or remove him from the workplace. The union agrees with this argument.

CF&I contends that neither a banana oil or irritant smoke test is mandatory under section 1910.134(e)(5). In its view it complied with the standard by providing a positive-negative pressure test to employees at the outset of their employment.

The judge found that CF&I willfully violated section 1910.1029(g)(3) by failing to provide respirators with a different size facepiece to employees who failed the banana oil test. The judge rejected CF&I's argument that administration of a positive-negative pressure test complies with section 1910.134(e)(5) since this test is not done in a test atmosphere as required by the standard. He also reasoned that by failing to replace the respirators of those employees who failed the banana oil test, CF&I had failed to comply with the "fitted properly" requirement of section 1910.134(e)(5).

The gravamen of the alleged violation is CF&I's failure to assure that employees in the regulated area were equipped with respirators that fit, which the Secretary asserts must be determined through use of a test atmosphere. The Secretary cites section 1910.1029(g)(3), which is part of the "Respiratory protection" section of the coke oven emissions standard. However section 1910.1029(g)(4)(i), which is also a part of the general "Respiratory protection" section, specifically covers the fit of respirators. It provides that "the employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." In our opinion, section 1910.1029(g)(4)(i) is specifically applicable to the cited condition and should have been cited by the Secretary instead of section 1910.1029(g)(3).

We read section 1910.1029(g)(3) as a training standard; it does not require the employer to assure proper fit of an employee's respirator. Section 1910.1029(g)(3) requires the employer to establish a respiratory protection program in compliance with section 1910.134. Section 1910.134(b), entitled "Requirements for a minimal acceptable program," states that the user shall be "*instructed* and *trained* in the proper use of respirators and their limitations." (Emphasis added.) At no place does section 1910.134(b) state that the employer must assure proper fit of respirators. The Secretary nevertheless refers to language in section 1910.134(e)(5) concerning proper fit and a test atmosphere in support of his argument that section 1910.1029(g)(3) requires the employer to assure proper respirator fit. We do not agree. Section 1910.134(e)(5) requires instruction to users in the selection, use, and maintenance of respirators. It then states that training shall provide the employees "an opportunity," to among other things, "handle the respirator, have it fitted properly, test its face piece-to-face seal, . . . [and] wear it in a

test atmosphere." We interpret section 1910.134(e)(5) as requiring the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal. The employees must also be given hands-on-experience with the respirators during training. Accordingly, each employee must be given a respirator and the opportunity to wear it, including the chance to wear the respirator in a test atmosphere, during training. However, section 1910.134(e)(5) does not, as the Secretary asserts, require that the employer assure proper fit of the respirator or specify how this is to be done. As we noted previously, section 1910.1029(g)(4)(i) covers this safety requirement.[10]

It is a well established principle of statutory construction that a statute or regulation must be read as a whole and that all parts of a statute, if at all possible, are to be given effect. *See Simplex Time Recorder Co.*, 85 OSAHRC ____/____, 12 BNA OSHC 1591, 1594 n.6, 1986 CCH OSHD ¶ 27,456, p. 35,569 n.6 (No. 82-12, 1985); *Northwest Airlines, Inc.*, 80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1989, 1980 CCH OSHD ¶ 24,750, p. 30,487 (No. 13649, 1980). Here the Secretary's own standards make a distinction between training in respirator use and assurance of proper respirator fit: Section 1910.1029(g)(3) requires the establishment of a respirator protection program while section 1910.1029(g)(4)(i) requires respirators to be fitted properly. It would therefore

[10] A second sentence in section 1910.1029(g)(4)(i) had provided that quantitative fit tests shall be performed annually for each employee who uses a non-powered, particulate filter respirator. This provision was struck down by the *ISM* court and was deleted by the Secretary after the *ISM* litigation. 50 Fed. Reg. 17852 (1985). It has not been repromulgated by the Secretary.

be anomalous to equate training with proper respirator fit. *See United States Steel Corp.*, 77 OSAHRC 64/C8, 5 BNA OSHC 1289, 1296, 1977-78 CCH OSHD ¶ 21,795, p. 26,225 (Nos. 10825 & 10849, 1977). Indeed to interpret section 1910.1029(g)(3) as requiring the employer to assure proper respirator fit would read out of the standard any meaning to 1910.1029(g)(4)(i).

Moreover, the source standard from which section 1910.134 was derived makes clear that use of a test atmosphere to determine respirator fit is not mandatory. In this case, the source standard is ANSI *Z*88.2-1969. Like section 1910.134(e)(5), the ANSI source standard requires the use of a test atmosphere for the training of employees. ANSI *Z*88.2-1969, § 7.4. However, the ANSI source standard does not state that the employer must assure proper respirator fit during training; it also makes clear that a test atmosphere is not mandatory for determining facepiece fit.[11] The ANSI provision states that "[p]otential users of respirators *should* also be required to test their facepiece fit by wearing the respirator under realistic test conditions." (Emphasis added.) ANSI *Z*88.2-1969, § 7.5. Like most ANSI standards, ANSI *Z*88.2-1969 contains a provision explaining the significance of the words "shall" and "should." Section 1.3 states:

> 1.3 "*Shall" and "Should"*. The provisions of this standard are mandatory in nature where the word

[11] The successor to ANSI *Z*88.2-1969, ANSI *Z*88.2-1980, requires for the first time that wearers of negative pressure respirators be given either a qualitative fit test, such as a banana oil test (see ANSI *Z*88.2-1980, Appendix 3 A5.2), or a quantitative fit test, which tests fit by numerical measurement with instruments that compare contaminant levels inside and outside the respirator. See ANSI *Z*88.2-1980, § 6.11 and Appendix 3 A 6.

> "shall" is used and advisory in nature where the word "should" is used.

Since the ANSI source standard does not require the use of a test atmosphere to determine respirator fit, we do not interpret the OSHA standard to require use of a test atmosphere to determine respirator fit.[12]

In the instant case, CF&I raised the applicability of section 1910.1029(g)(4)(i), and the compliance officer acknowledged that it applied. He also acknowledged that he might have cited the wrong standard.[13] The Secretary,

[12] Section 1910.134(e)(5) was adopted under section 6(a) of the Act without regard to the comment and notice rulemaking provisions of section 6(b) and the Administrative Procedure Act, 5 U.S.C. § 553. For this reason it cannot be substantially modified from its source. *Diebold, Inc. v. OSHRC*, 585 F.2d 1327, 1332 (6th Cir. 1978); *George C. Christopher & Son, Inc.*, 82 OSAHRC 9/A2, 10 BNA OSHC 1436, 1442-43, 1982 CCH OSHD ¶ 25,956, pp. 32,530-31 (No. 76-647, 1982).

[13] The compliance officer did not cite section 1910.1029(g)(4)(i) because it was his "understanding" that after the quantitative fit test provision was stricken by the *ASI* court, an agency policy statement directed inspectors not to enforce section 1910.1029(g)(4)(i). The compliance officer's belief, however, was erroneous. The compliance officer apparently based his belief on OSHA's Program Directive 300-10 (revision No. 1 dated October 30, 1978). This directive states:

> (7) *Respirator Fit Test (prior)*. Coke oven employers are required to perform respirator fit tests annually for each employee who uses a non-powered, particulate filter respirator. The preamble of the standard incorrectly describes the procedure for quantitative fit test. Since the record does not support the requirement for annual quantitative respirator fit testing, OSHA intends to conduct a separate rulemaking on that issue in the near future. In the interim, only a requirement for qualitative fit testing will apply.

The directive does not state that the first sentence of section 1910.1029(g)(4)(i), which requires that employers assure that

however, did not move to amend, see note 15, *infra*, and continues to allege a violation of section 1910.1029(g)(3).[14] We therefore must address whether the Secretary has proven a violation of section 1910.1029(g)(3).

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respirators are "properly fitted," is not to be enforced. In any event, the first sentence of the standard had not been struck down by the *ASI* court. It therefore continued to be in effect when the citations in this case were issued and the directive indicates that it continued to require qualitative fit testing.

[14] The Secretary has taken inconsistent positions regarding the interpretation of section 1910.134(e). In the 1979 version of OSHA's *Industrial Hygiene Field Operations Manual*, Ch. XII, section I (text as of January 1, 1979), reproduced in CCH Employment Safety & Health Guide, OSHA Field Operations Manual and Industrial Hygiene Field Operations Manual, ¶ 4488.40 (1979), OSHA instructed its compliance officers that "respirator fit" can be checked by one of the following methods:

> (i) Positive Pressure Test: . . . . [Detailed instructions omitted.]
> (ii) Negative Pressure Tests: . . . . [Detailed instructions omitted.]
> (iii) Manufacturer's Instructions. Follow the directions provided by the respirator manufacturer. The [compliance officer] is not permitted to use[] irritating chemicals to test facepiece fit.
> (iv) Chemicals. Some employers may use irritant smoke or isoamyl acetate [banana oil] for the respirator fitting test. . . .
> Although OSHA does not recommend using chemicals, it is a common practice and no standard directly prohibits it unless the permissible exposure limits are exceeded.

The Manual instructed the compliance officer that when he observes employees to determine proper fitting, he is to see if fitting "is done by either negative or positive pressure test or other methods as used by the employer as described in paragraph (2)(b)(iii) and (iv). . . ."

After the hearing in this case, the Secretary, prompted in part by "a request for compliance procedures" and what he characterized as "litigation activities," issued a policy directive on section 1910.134(e)(5) to "clearly establish enforcement policy on the fit-testing issue." That directive is Instruction CPL 2-2.29(BNA 27, 1980), *reproduced in* 1980-81 CCH OSHA Decisions ¶ 12,105. It states that "[a] 'test atmosphere' must be applied to assess the quality of fit." *Id.* ¶ I. 2.

The Secretary alleges a violation of section 1910.1029(g)(3) because twenty-eight employees were not given a proper fitting respirator after failing the banana oil test. The mere fact that employees entered a test atmosphere and encountered facepiece leakage does not mean, however, that their training was inadequate. Indeed the Secretary's respirator expert, Dr. Pritchard, testified that every respirator leaks to one degree or another and that the odor threshold between individuals for detecting banana oil varies. Dr. Pritchard also noted that an employee could smell banana oil because he does not place the mask on his face properly, and not because the mask size is incorrect. In order to prove a violation of section 1910.134(e)(5) the Secretary must show that employees were not adequately instructed in the proper selection, use, and maintenance of respirators or were not permitted to handle the respirator under certain conditions. CF&I had a training program that included instruction in the selection and use of respirators and the avoidance of facepiece leakage. Employees were given an opportunity to handle the respirator under various conditions and to wear it in a test atmosphere under the guidance of an industrial hygienist. The fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate. We thus conclude that the Secretary failed to establish a violation of 29 C.F.R. § 1910.1029(g)(3). Accordingly, we vacate the citation for violation of this standard.[15]

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[15] Since the parties did not expressly or impliedly consent to try a violation of section 1910.1029(g)(4), we conclude it would be improper to amend to allege a violation of this standard. *See McWilliams Forge Co.*, 84 OSAHRC ____, 11 BNA OSHC 2128, 1984 CCH OSHD ¶ 26,979 (No. 80-5868, 1984).

Citation 3: Smoking and Training.

Items two and three of this citation are in dispute. Item 2 of the citation alleges that CF&I violated 29 C.F.R. § 1910.1029(i)(5)(i) by allowing two employees to smoke in the north and south coal bin and door repair areas during OSHA's inspection. This standard states:

> (i) The employer shall assure that *in the regulated area,* food or beverages are not present or consumed, *smoking products are not present or used,* and cosmetics are not applied, except that these activities may be conducted in the lunchrooms, change rooms and showers required under paragraphs (i)(1)-(i)(3) of this section.

(Emphasis supplied.) There is no dispute that the employees in question were smoking in these areas. There also is no dispute that these areas are beyond the pinion wall. The judge affirmed this item based on his conclusion that these areas were part of the "battery ends" and, thus, part of the regulated area. As explained above, we conclude that the areas in question – the north and south door repair and coal bin facilities – are not part of the "regulated area" because they are beyond the "battery ends." Accordingly, we reverse the judge's decision and vacate this item.

Item 3 of this citation involves an alleged violation of the employer training standard at 29 C.F.R. § 1910.1029(k)(1)(ii). Item 3 alleges:

> 29 CFR 1910.1029(k)(1)(ii): The employer did not institute an effective training program for Coke oven employees working in the regulated area or at the time of initial assignment to the regulated area, in that:
>
> a) New employees, with no prior work experience in the regulated area, did not receive adequate

> on-the-job training on the proper work practice and written procedures to minimize Coke oven emissions prior to assignment in the regulated area.
>
> * * *
>
> c) Employees with experience in the regulated area, did not receive adequate instructions and on-the-job training in the proper work practices and written procedures to minimize Coke oven emissions prior to assignment to a new job position they have not worked before.

The cited standard provides:

> (k) *Employee information and training* – (1) *Training program.*
>
> * * *
>
> (ii) The training program shall be provided as of January 27, 1977 for employees who are employed in the regulated area at that time or at the time of initial assigment to a regulated area.

Essentially, this item alleges that CF&I violated the standard by failing to provide "written instructions" and "on the job" training to new employees upon assignment to the regulated area as well as to "experienced" employees upon re-assignment in the regulated area. The judge determined that the standard required employers only to provide written instructions to employees upon their "initial assignment to the battery." He therefore affirmed this citation to the extent that it alleged that CF&I violated the standard by failing to provide written instructions to employees who were newly-assigned to the regulated area. He vacated this item to the extent that it alleged that CF&I violated the standard by failing to provide (1) "on-the-job"

training to employees newly assigned to the regulated area, (2) written instructions to experienced employees who were re-assigned to different positions on the battery, and (3) "on-the-job" training to experienced employees who were reassigned to new positions on the battery.

CF&I does not take issue with the judge's partial affirmance of this item.[16] Relying on various portions of the preamble, the union, however, asserts that the standard requires more extensive training for newly-assigned and experienced employees.[17] Although it concedes that the standard does not state all of the types of training that employers must provide, it asserts that "reasonable and feasible" training must be made available and cites several cases, including *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976), for support. The Secretary also asserts that the standard requires on-the-job

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[16] The Secretary did not petition for review of the judge's partial vacation of the item.

[17] The union cites the following language from the preamble in support of its claim that more extensive training was required:

> "A major portion of the effort in the control of coke oven emissions involves work practices. These include regular inspection, maintenance, cleaning and repair of all the equipment and strict adherence to prescribed schedules. *Employees must be properly trained in such work practices and their importance.* The proper training of all employees will require time."

41 Fed. Reg. at 46,761 (emphasis supplied by union).

> "Such a written program assures that all the elements are considered and can be used not only to evaluate the effectiveness of the program *but also to train employees*. For example, in implementing the cleaning requirement, the written program could specify job assignments, cleaning tools and a checkoff or reporting system for the operating crew depending on the needs of that particular plant."

41 Fed. Reg. at 46,767 (emphasis supplied by union).

training for new and experienced employees. He also relies on the preamble and argues that only through such training can the employer be assured the employees knew the proper work practices.

As the judge found, the text of the standard requires that employees be provided with written instructions only upon their "initial assignment" to the regulated area. The preamble to the standard also does not state or imply that employers are required to provide anything more than initial training to employees who are newly assigned to the regulated area. We therefore agree with the judge's conclusion that CF&I did not violate the standard by failing to provide on-the-job training to new employees and written instruction as well as on-the-job training to experienced employees.

The cases cited by the union in support of its argument also are inapposite. In none of the cases did the Commission or the courts read an additional training requirement into an employee training standard. Rather, these cases held that in order to sustain a defense that it neither knew nor could have known of the occurrence of a violation, an employer must show that it provided "reasonable and feasible" training to it employees. Based on the foregoing, we affirm the judge's decision to vacate that portion of the citation which alleged that CF&I violated section 1910.1029(k)(1)(ii) by failing to provide on-the-job training to new and experienced employees and written instructions to experienced employees.

Accordingly, we vacate citations 1, 2, item 2 of citation 3, and item 3 of citation 3 to the extent that it alleged that the employer was required to do more than allow em-

ployees to review the written procedures for their job when initially assigned to the regulated area.

FOR THE COMMISSION

/s/ Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

DATED: SEP. 12, 1986

WALL, Commissioner, dissenting in part:

I agree with the Commission's disposition of citations 1 and 3. I respectfully dissent, however, from the decision to vacate citation 2, concerning training in the wearing of respirators. I conclude that section 1910.134(e)(5) applies, that it was violated, and that the violation was willful.

To restate the facts of this issue, during the course of training in the wearing of respirators, some of CF&I's employees wore respirators in a test atmosphere of banana oil. Twenty-eight of the employees reported smelling the banana oil, which indicated that their respirators did not fit properly. They were not supplied with respirators that did fit; rather they were sent to work in a toxic atmosphere wearing respirators that were demonstrably unsuited for the purpose.

The majority emphasizes that the standard in question, contained in paragraph 1910.134(e)(5), is a training standard. I don't take serious issue with this because, whether it is a training standard or a use standard the evidence clearly demonstrates that it was violated. The governing standard, paragraph 1910.1029(g), is headed "*Respiratory Protection.*" Paragraph (g)(3) requires that "The employer shall institute a respiratory protection program in accordance with § 1910.134 of this Part." Paragraph 1.34(b) is headed "*Requirements for a Minimal Acceptable Program.*" Paragraph 1910.134(e)(5), the standard which was cited in the case, is headed "*Use of Respirators.*" Paragraph (e)(5), in its pertinent part, states that "For safe *use* of any respirator, it is essential that the user be properly instructed in its . . . *use* . . . . Training shall provide the men an opportunity to handle the respirator, *have it fitted properly*, . . . and . . . to wear it in a test atmosphere." (Emphasis added)

CF&I does not deny that 28 employees failed a so-called "banana oil test," and were then sent into the area of coke oven emissions with respirators that obviously did not fit. This clearly establishes that the 28 employees were not provided with respirators that fit, were not trained to comprehend the proper fit of respirators, or to use the respirators properly. Thus, even if paragraph 1910.134 (e)(5) is construed as a respirator training standard, the 28 employees certainly were not trained in the use of respirators. Nor could it seriously be argued that this was a minimal acceptable program.

The suggestion that CF&I could have been cited under paragraph 1910.1029(g)(4) does not affect my conclusion. CF&I may have breached another respirator standard as well, but this does not mean that it was not properly cited under paragraph 1910.134(e)(5). The 1910.134(e)(5) citation alleged a failure to train in the use of respirators and, expressly, that employees did not have an opportunity to have their respirators fitted properly. The gravamen of the charge concerns the initial fitting of respirators; a process that is ordinarily associated with the indoctrination or training phase of respirator use. Although the facts of this case might also support a violation of 1910.1029(g)(4), the respirator usage standard, the Secretary has a legitimate concern about the initial fit of respirators, and chose to allege that the employees were not trained properly under paragraph 1910.134(e)(5). This is within his prosecutorial discretion, and is not grounds for vacating the citation.

Regarding the use of banana oil, the question of whether a banana oil test was required, or what test is required, is beside the point. Whether Respondent was required to use the banana oil test, it *did* use the banana oil, and it demonstrated that the respirators did not fit. Given this knowledge, by whatever test the knowledge was obtained, it can hardly be said that the employees were

properly trained in the use of respirators. The purpose of paragraph 1910.134(e)(5) is to ascertain whether the respirator provides protection (have it fitted properly), and to prepare employees to work and function in a toxic environment.

This is clear not only from the language of the test atmosphere provision of 1910.134(e)(5), but also from the ANSI standard which is the source of the OSHA standard. As the majority notes, we may generally not construe an OSHA standard adopted under section 6(a) of the Act, 29 U.S.C., § 665(a), in a way that is different from its ANSI ancestor. Under the 1969 ANSI standard, the positive and negative pressure tests were only *field* tests. Section 7.5 of the ANSI standard states that "[t]o assure proper protection, the facepiece fit shall be checked by the wearer *each time he puts on the respirator*. This may be done by following the manufacturer's facepiece-fitting instructions such as these simple *field* tests: . . . ." (Emphasis added.) What then follows in sections 7.5(1) and (2) are detailed descriptions of the positive and negative pressure tests. The test atmosphere procedure is described next as a means for employees "to *test facepiece fit* by wearing the respirator under realistic test conditions." ANSI section 7.5, third paragraph (emphasis added). The passage goes on to state that if an employee does not detect the odor of banana oil, "he has a good fit." Thus, the ANSI standard contemplates that the "test atmosphere" provision of the training standard is a means for fitting a respirator properly during training. Another portion of this same paragraph demonstrates that training the employee in the achievement of proper fit is not all that the standard expects. The third paragraph of section 7.5 makes clear that the results of a banana oil test could well require the employer to provide another respirator to the employee if

the first allows the employee to smell banana oil. That paragraph states in part:

> If [the respirator wearer] detects the odor [of banana oil], he should retreat to fresh air, *readjust the facepiece*, and repeat the test. If leakage is still noted, it can be concluded that this particular respirator will not protect the wearer. *The wearer should not continue to tighten the headband straps until they are uncomfortably tight, simply to achieve a gas-tight fit.* If fitted too tightly, the wearer will not wear the respirator or will wear it fitting comfortably loose and will not have a gas-tight seal. (Emphasis added)

That a respirator's straps may not be tightened by the employee after a point means that unless the employer monitors the result of the banana oil test and provides a different respirator, there can be no assurance that *any* amount of employee training will help an employee achieve proper fit.

I also find that the violation was willful. A violation is willful if it is committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety. *Simplex Time Recorder Co.*, 85 OSAHRC ____, 12 BNA OSHC 1591, 1595, 1985 CCH OSHD ¶ 27,456, p. 35,571 (No. 82-12, 1985). In a training film, CF&I informed employees that they would be provided with a different respirator if they failed the banana oil test. It clearly understood that the fit of respirators was to be evaluated in a "test atmosphere." It administered banana oil tests, yet failed to provide different respirators to at least 28 employees who failed. These 28 employees then were sent to the regulated area and in several instances were exposed to toxic coke oven emissions above the permissible exposure limit without proper respiratory protection. This conduct demonstrates, at the very least, plain indifference to employee safety.

APPENDIX D

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 79-4786

SECRETARY OF LABOR, COMPLAINANT

v.

CF&I STEEL CORPORATION, RESPONDENT

AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 2102, AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge:

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 659(c), involving alleged violations of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2).[1] Jurisdiction over the parties and the subject matter is admitted in the pleadings.

Hearings in this matter were conducted in Pueblo, Colorado commencing February 25, 1980 and ending February 29, 1980. The affected employees were represented throughout these proceedings by the United Steelworkers of America, AFL-CIO, the authorized employee representative (AER).

[1] "Each employer shall comply with Occupational Safety and Health Standards promulgated under this chapter."

At the conclusion of the hearings, the parties were invited to submit proposed findings of fact, conclusions of law and briefs in support thereof as well as reply briefs. (Tr. 891)[2] All parties submitted briefs; however, complainant did not submit proposed findings of fact or conclusions of law. Subsequently, respondent and the AEAR submitted reply briefs. Thereafter, respondent filed a letter dated May 30, 1980 containing further argument. In the absence of objection by the other parties, this letter was not stricken from the record even though it was unauthorized under the prescribed briefing schedule. By order dated June 5, 1980, the other parties were granted an opportunity to respond to the matters contained in respondent's May 30, 1980 letter. The letter dated June 2, 1980 from the AEAR constitutes the only submission responsive to that authorization.

Having heard and observed the witnesses who testified during the hearings, and having considered the pleadings, the admissions and the other evidence presented at hearing together with the post-hearing submissions by the parties, the undersigned hereby makes the findings, conclusions and order set forth below. To the extent that proposed findings of fact or proposed conclusions of law have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case. To the extent that there are any pending motions which have not been expressly granted herein, they are DENIED.

[2] The following abbreviations shall be used in this decision:

Tr. — Transcript
C — Complainant's Exhibit
R — Respondent's Exhibit

FINDINGS OF FACT

1. Respondent's plant is located near Pueblo, Colorado and is a fully integrated steel mill. (Pleadings)

2. Within this plant, respondent operates a coke plant. (Pleadings)

3. Respondent has three adjoining coke oven batteries designated as Batteries B, C and D. Battery B is located on the south end of the configuration, Battery C is in the middle, and Battery D is located on the north end. (Tr. 678-679, C-3, R-36)

4. At each end of each of respondent's three batteries is a pinion wall. (Tr. 728-729, R-59)

5. A pinion wall is composed of large blocks of refactory (Tr. 686), five to six feet wide (Tr. 729), which extends vertically from ground level to topside and which basically serve as a bulkhead. (Tr. 728, R-59)

6. The "battery end" is considered throughout the industry to be the pinion wall. (Tr. 679-680, 728)

7. Respondent does not have any coal loading areas between its batteries. (Tr. 240)

8. Respondent established the pushcar machines and the Larry car machines as regulated areas when they were being operated between the south pinion wall of Battery B and the north pinion wall of Battery D. (Tr. 727-728)

9. Respondent did not establish the push car machines and the Larry car machines as regulated areas when they were positioned beyond the pinion walls. (Tr. 727-728)

10. Immediately north of the north pinion wall of Battery D and separated by a small, open area is the lunchroom and foreman's office. (Tr. 735, 736, 738, R-59)

11. Above the aforesaid foreman's office and lunchroom facilities is the north coal bin area which is on the same horizontal plane as the topside of Batteries B, C and D. (Tr. 735, 736, C-1, C-3, R-7 and R-58)

12. Immediately north of the foreman's office and lunchroom described above is the north door repair facility which is on the same horizontal plane as the office, and the lunchroom. (Tr. 737, R-58, R-61 and R-62, R-61 and R-62)

13. Immediately south of the south pinion wall of Battery B is substantially the same configuration of facilities, positioned inversely, as are located north of the north pinion wall of Battery D. (Tr. 700, C-3)

14. The coke ovens and other facilities described above essentially consist of the following three levels:

a. Ground level where the tracks for the pusher machine and quench car are located (R-61 and R-62);

b. Bench level where the door machine tracks run, the lunchroom, the foreman's office, the door repair facilities and the doors to the coke ovens are located (R-61 and R-62; and

c. Topside where the Larry car tracks and coal bins are located. (C-1, R-4, R-7, R-28 and R-30)

15. The tracks at ground level and bench level extend from the south end of the south door facility to the north end of the north door facility. (C-3, R-2 and R-61)

16. The tracks at topside extend from the south end of the south coal bin area to the north end of the north coal bin area. (Tr. 548, C-1 and R-7)

17. Push car machine Nos. 1, 2 and 3 constitute machines that are operated on the push side of respondent's Batteries B, C and D. (Tr. 140, 329, 556, R-8 and R-34)

18. Larry car machines Nos. 1, 2 and 3 constitute machines that are operated on topside of Batteries B, C and D. (Tr. 737, 526, 553 and R-6)

19. By virtue of their exposure to coke oven emissions while in operation, pushcar machines 1, 2 and 3 and Larry-car machines 1, 2 and 3 are contaminated. (Tr. 143-144)

20. Doors to respondent's coke ovens are contaminated with coke oven emissions (Tr. 813)

21. Coke oven emissions in excess of the permissible exposure limit have occurred in respondent's facilities which are beyond the pinion walls of Batteries B, C and D. (C-22)

22. The respirator training provided to respondent's employees prior to assignment to regulated areas consisted of the provision of respirators, coupled with instructions on its use and how to do a positive/negative fit test. (Tr. 101, 102, 772 and 773)

23. Qualitative fit testing in a test atmosphere was not provided to respondent's employees prior to their initial assignment in regulated areas. (Tr. 103, 819)

24. The positive/negative fit test does not meet the requirement of testing in a test atmosphere. (Tr. 462)

25. The two most common types of test agents which meet the test atmosphere requirement are isoamyl acetate (banana oil) and irritant smoke. (Tr. 459)

26. Irritant smoke is a less subjective; hence, a more reliable testing agent than isoamyl acetate. (Tr. 461, 490)

27. Because a positive/negative pressure fit test can easily give a false indication of fit, it is an unreliable means of determining whether a respirator fits properly. (Tr. 462-463)

28. If the testing agent is smelled during a qualitative fit test, the respirator does not fit properly.

29. Respondent failed to provide and assure the use of appropriate protective clothing by its employees. (Tr. 39, 274, 411)

30. Respondent's employee who was not provided with appropriate protective clothing, was exposed to the hazard of flames and extreme heat generated by the coke ovens. (Tr. 39-40, 440, C-2)

31. Respondent's employees who were not provided with appropriate protective clothing, were exposed to the hazard of coke oven emissions which could collect on their clothing. (Tr. 81-82, 95, 274, 286, 411, C-2)

32. Respondent failed to assure that smoking products were not present or used in the regulated area. (Tr. 59 & 248)

33. Respondent's training program which was provided prior to the initial assignment of employees to the regulated area, did not include a review of the written procedures pertaining to work practices. (Tr. 100-101)

CONCLUSIONS OF LAW

1. Respondent violated 29 C.F.R. § 1910.1029(d)(2)(i) in that it did not establish the machinery and areas specified in Citation No. 1, Item No. 1, as regulated areas.

2. The aforesaid violation was serious.

3. Respondent failed to comply with 29 C.F.R. § 1910.134(e)(5) in that respondent's respirator training program did not provide respondent's employees an opportunity to have their respirators fitted properly.

4. The failure of respondent to comply with the aforesaid provision of the Respiratory Protection standard (29 C.F.R. § 1910.134), constitutes a violation of 29 C.F.R. § 1910.1029(g)(3).

5. The aforesaid violation constitutes a willful violation within the intent and meaning of the Act.

6. Respondent violated 29 C.F.R. § 1910.1029(h)(1)(i) in that it failed to provide appropriate protective clothing to its employees.

7. The aforesaid violation constitutes a repeated violation within the intent and meaning of the Act.

8. Respondent violated 29 C.F.R. § 1910.1029(i)(5)(i) in that respondent failed to assure that smoking products were not present or used in the regulated area.

9. The aforesaid violation constitutes a repeated violation within the intent and meaning of the Act.

10. Respondent violated 29 C.F.R. § 1910.1029(k)(1)(ii) in that the training program that was provided to employees prior to their initial assignment to the regulated area, did not include information concerning the written procedures specified under 29 C.F.R. § 1910.1029(f)(7).

11. The aforesaid violation constitutes a repeated violation within the intent and meaning of the Act.

DISCUSSION

Citation No. 1, Item No. 1

The first charge involves an alleged serious violation of 29 C.F.R. § 1910.1029(d)(2)(i) which provides:

> The employer shall establish the following as regulated areas: (i) The coke oven battery including topside and its machinery, push side and its machinery, coke side and its machinery, and the battery ends; the wharf; and the screening station.

The specific allegations, as set forth in Citation No. 1, Item No. 1, are:

> 29 C.F.R. § 1910.1029(d)(2)(i): The employer did not establish the following areas of the Coke Plant as regulated areas:
> (a) Push car machine Nos. 1, 2 and 3;
> (b) larry car machine Nos. 1, 2 and 3;
> (c) topside north coal bin area;
> (d) topside south coal bin area;
> (e) bench level north door repair facility;
> (f) bench level south door repair facility.

Complainant proposes a penalty of $1,000.00 for this item.

Respondent does not dispute that the machinery specified in the citation were not established as regulated areas when they were positioned in certain areas. Respondent also does not dispute that the four specified work areas were not established as regulated areas. Further, respondent does not dispute that its employees had access to the machinery and areas which complainant contends should have been regulated. Nevertheless, respondent does dispute whether the standard requires that the machinery and areas be established as regulated areas.

In essence, respondent argues for a narrow interpretation of what is included under the standard as "battery ends." In support of this position, respondent relies upon 29 C.F.R. § 1910.1029(b) which defines coke oven battery as "a structure containing a number of slot-type coke ovens" coupled with the unrefuted evidence that the industry considers the "battery ends" to be the pinion walls.

Complainant and the AER argue for a broader interpretation of the standard. They argue that the "battery ends" include the coal bin areas and the door repair facilities which are beyond the pinion walls. The essence of this argument is that all of these facilities, as well as the coke ovens themselves, are one continuous structure; hence, the coal bin areas and the door repair facilities should be considered to be the "battery ends" as that term is used in the standard.

Thus, as stated by respondent, the critical issue presented here is what is meant by the term "battery ends" as that term is used in the standard.

The provision which prescribes the establishment of regulated areas and defines such areas is the key to the entire coke oven emission standard. As described in the statement of basis and purpose for the coke oven emission standards entitled "Exposure to Coke Oven Emissions" (Preamble), 41 Fed. Reg. 46,742-90 (1976), it defines the areas wherein access is limited to authorized persons. 41 Fed. Reg. at 46,756. It further serves to reduce the ingestion of coke oven emissions by prohibiting the presence or consumption of food or beverages, the presence or use of smoking products and the application of cosmetics in the areas defined as regulated areas. 41 Fed. Reg. at 46,776. Similarly, it requires, for those who work in the defined regulated areas, the use of hygiene practices and the provision of hygiene facilities (washing and showering facilities) so that coke emissions that are collected on employees will

be removed and not subsequently ingested. 41 Fed. Reg. at 46,776.

After considering the evidence and argument presented, the undersigned has determined to adopt the single structure interpretation advanced by complainant and the AER. The basis for this determination is that the battery looks like a single structure; that it was the intent of the promulgators of the coke oven emission standard to include within the regulated areas, work areas which are beyond the pinion walls of respondent's batteries; and that the purposes of the standard are best served by a broad interpretation of what is included in the term "battery ends," as that term is used in 29 C.F.R. § 1910.1029(d)(2)(i).

The most graphic evidence that respondent's facilities, beginning with the south door repair facility and extending to the north door repair facility, constitute a single structure is the aerial photograph depicted in C-2. Indeed, anyone, except possibly a member of the coke oven industry, would likely view such facilities as one structure despite the differences in the skyline created by the vertical extension of the coal bins beyond that of the other facilities comprising the structure. Nevertheless, these different facilities are all accessible to one another at one or more levels and are in close proximity to the ovens for reasons of efficiency or are required to be in close proximity to the ovens for reasons of health and safety.

Major support for the determination that the promulgators of the standard intended to include, within the term "battery ends," facilities which ~~are located~~ beyond the pinion walls is presented in the Preamble. Here, the "coal bunkers" are described as being located "~~at the~~ battery ends." 41 Fed. Reg. at 46,743. A "Coal bunker," which is primarily referred to in this case as a "coal bin," is a facility where coal is stored for transfer into special cars (Larry cars) that operate on rails at the top of the battery

(topside). 41 Fed. Reg. 46,743, (Tr. 548, R-4) From there, the coal is transferred by the Larry car to the individual coke ovens where it is deposited into the ovens from the top. It is clear from the record that these coal bunkers (coal bins) could not be expected to be located within the pinion walls of a battery. Instead, they would ordinarily be located either between the coke oven batteries (but outside the pinion walls that enclose each battery) or "at the battery ends." In either case, the coal bunker would be beyond the pinion walls of the coke oven battery. Thus, it is clear that the Secretary, in using the term "battery ends," contemplated facilities and workplaces that were located beyond the pinion walls. It is further clear that the Secretary, in using the term "battery ends," in 29 C.F.R. § 1910.1029(d)(2)(i) contemplated that such areas include the coal bunkers.

It is the express intention of the promulgators of the standard to include within the regulated areas, all work areas wherein the permissible exposure limit to coke oven emissions could be exceeded. 41 Fed. Reg. at 46,757. Here, respondent's own documents show that the permissible exposure limit has been exceeded in the facilities which are beyond the pinion walls of respondent's batteries. (C-22) For this reason, it is believed necessary and appropriate to adopt the broad interpretation of "battery ends" advanced by complainant and the AER in order to give effect to this express intent.

The permissible exposure limit to coke oven emissions is 150 micrograms per cubic meter of air (150 ug/m^3) averaged over an 8-hour period. 29 C.F.R. § 1910.1029(c). While there are no area samples in evidence which were taken in either the coal bin areas or either of the door repair facilities areas, samples were taken in the north and south lunchrooms which are immediately below the coal bins and, at bench level, between the door repair facilities

and the pinion walls of the adjacent coke oven battery. These samples reflect a reading in the north lunchroom which approach the permissible exposure limit (142.85 ug/m^3) and a reading in the south lunchroom area which substantially exceeds the permissible exposure limit (250.00 ug/m^3). (C-22) It is clear, from this evidence, that the permissible exposure limit "could be exceeded"—indeed, has been exceeded—in work areas adjacent to respondent's coke ovens but beyond the pinion walls. Furthermore, it is found that such exposure limit could be exceeded in the four specific areas cited in the citation.

The permissible exposure limits could be exceeded in the coal bin areas due to the proximity of these areas to the primary source of coke oven emissions—the coke ovens themselves. These coal bins are approximately 25 feet from the nearest coke oven. (Tr. 696, 726, R-59) The sides of the coal bins nearest the ovens are exposed. (R-4, R-28) Thus, depending upon wind direction, the dozens of visible leaks of coke oven emissions emanating from the coke ovens that are observed at each of the inspections conducted by respondent, could be expected to drift into the coal bin areas and could exceed the permissible exposure limit. (Tr. 651-655, C-22, R-24, R-25)

By virtue of the greater distance between the coke ovens and the door repair facilities, *vis-a-vis* the distance between the coke ovens and the coal bins, the permissible exposure limit is less likely to be exceeded from emissions emanating directly from the ovens in the door repair facilities. Nevertheless, the permissible exposure limit could be exceeded in the door repair facilities due to the presence there of coke doors which are contaminated by coke oven emissions. (Tr. 700, 812 and 813) Since torches are used on the contaminated doors, the coke oven emissions would then be volatized and could exceed the permissible exposure limit. (Tr. 142, 700, 812 and 813)

For the foregoing reasons, it is found that the "battery ends" as that term is used in 29 C.F.R. § 1910.1029(d)(2)(i) includes the north and south coal bin areas and the north and south door repair facilities. Corollary, respondent's narrow interpretation of "battery ends" is rejected in that such interpretation would severely undermine the protections afforded by the standard.

Respondent's argument that the machinery is not required to be established as regulated areas when they are beyond the pinion walls is also rejected. Respondent concedes the necessity for establishing such machinery as regulated areas when they are in close proximity to the coke ovens themselves. However, the distinction drawn by respondent that such machines need not be established as regulated areas when outside the pinion walls is not delineated by the standard. Moreover, because the machinery could be expected to be contaminated with coke oven emissions even when they have been moved beyond the pinion walls, there is need for some, but not necessarily all, the protective requirements that come into play by designating the machines as regulated areas. (Tr. 141-143) Thus, the interpretation advanced by respondent is unfounded. Further, such interpretation would undermine the protections offered by the standard and is therefore rejected.

The remaining issue concerning this violation is the determination of an appropriate penalty. Subsumed within this issue is the threshold determination of whether the violation is serious within the intent and meaning of section 17(k) of the Act, 29 U.S.C. § 666(j).[3] This threshold issue will be addressed first.

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[3] ". . . (A) serious violation shall be deemed to exist . . . if there is substantial probability that death or serious physical harm could result from a condition which exists. . ." .

Respondent vigorously contends that the record in this case does not establish a serious violation. However, the Commission's recent decision in *Anaconda Aluminum Company*, 81 OSAHRC ____, 9 BNA OSHC 1460, 1981 CCH OSHD ¶ 25,300, No. 13102, 1981), is dispositive of all but two of the arguments advanced by respondent in support of its contention.

In *Anaconda*, the Commission, in finding a serious violation announced:

> [I]n deciding whether a violation is serious, we must look to the hazard against which the standard is intended to protect.[4]

The Commission reasoned that the standard's purpose was to protect *Anaconda*'s employees against contacting a life-threatening disease (cancer) by limiting such employees' exposure to coal tar pitch volatites (CTPV), a known carcinogen.[5] Thus, *Anaconda*'s failure to comply with the standard increased the risk of exposure to CPTV beyond the limits provided by the standard.

Applying that reasoning to this case, the hazard against which the standard is designed to protect is the same – cancer. However, the purpose of this standard is broader than to merely limit exposure. As previously outlined, it triggers the application of virtually all the various regulations designed to not only limit exposure but also to provide additional protections to employees such as the requirement of physical examinations to detect the symptoms of cancer. Thus, the failure to comply with the standard substantially increases the risk of exposure to coke oven emissions as well as substantially increases the possibility of harm to employees. Since coke oven emissions are also

[4] 9 BNA OSHC at 1477.

[5] *Id.*

carcinogenic, the possibility of death or serious physical harm, which could be expected to result from respondent's noncompliance with the standard, is as great or greater than was found to exist in *Anaconda*.

Nevertheless, respondent raises two arguments against classifying this violation as serious which are not addressed in *Anaconda*. First, respondent argues that the only evidence presented with regard to the health effects of coke oven emissions consisted of the Preamble to the standard which respondent characterizes as "uncorroborated hearsay." Respondent argues that such evidence, standing alone, "is insufficient as a basis for a finding that the violation is serious." (Respondent's Brief at 12)

This argument is unpersuasive. While the findings made in the Preamble to the standard is hearsay, it falls within the well-recognized exception to the hearsay rule codified as Fed. Rule of Evid. 803(8)(c) which provides:

> The following are not excluded by the hearsay rule. . . :
>
> (c) . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.[6]

Since this evidence comes within such exception, it is considered to have sufficient probative value to support a finding that the violation was serious.

Additionally, respondent argues that the preponderance of the evidence in this case establishes that the violation would not result in death or serious physical harm. (Respondent's Brief at 18) In support of this argument, re-

[6] Since respondent unsuccessfully challenged the validity of the standard in *American Iron and Steel Institute v. OSHA*, 577 F.2d 825 (3rd Cir. 1978), respondent cannot challenge, in this proceeding, the trustworthiness of the Secretary's findings upon which the standard is based. In fact, respondent has not even raised this issue.

spondent relies upon the testimony of its in-house physician, Dr. Robert S. Young. (Tr. 831-873) Dr. Young, whose specialty is orthopedic surgery (Tr. 832), testified that on the basis of certain studies, which he conducted, he concluded:

> There was no increase in the death rate for either pulmonary, skin or urological carcinogens in the coke oven workers (of respondent) as opposed to the general steel people or as opposed to the general population. (Tr. 850-851)

After carefully considering Dr. Young's testimony and the studies upon which his conclusion is based, it is determined that no weight should be given to such evidence. The studies were not shown to be statistically valid. (Tr. 855-856, 858-859) Moreover, the studies themselves contain deficiencies which seriously brings into question their reliability.

There are essentially three studies which Dr. Young relied upon in reaching his conclusion. The first two are reported in the statement he prepared for submission in the rule-making proceeding. This statement is dated December 10, 1975 and was received in evidence as R-159. The third study is reported in the supplemental statement (R-159A) dated May 5, 1976, which was also prepared for submission in that same rule-making proceeding.

The first study consisted of an examination of the statistics of the computer department of St. Mary Corwins Hospital in Pueblo, Colorado for reports of malignancies of the pulmonary, skin and urinary systems for the years 1966-1974. (Tr. 850-851; R-159A) The pertinent figures reported in this study are:

(a) This hospital "provides care for approximately 75% of CF&I's employees. (R-159 at 2)

(b) "Coke oven employees comprise 3.89% of CF&I's work force." (R-159 at 3)

(c) "During the period 1966-1974, 66 CF&I employees died of either pulmonary or urinary cancer, none of skin cancer." (R-159 at 2)

(d) ". . . only five [of such deceased employees] worked in the coke plant." (R-159 at 2)

(e) Only two of the five were regular employees. (R-159 at 2-3)

(f) Only 3.03% of the deaths of CF&I employees attributable to malignancies were regular coke oven employees. (R-159 at 3)

In the absence of testimony from qualified experts indicating that such studies are statistically valid (which is the case here), no weight is given to this study. Furthermore, it suffers from patent deficiencies which seriously undermine its reliability.

The study assumes that those CF&I employees for whom the hospital "provides care" use the hospital exclusively for problems relating to malignancies. Since the evidence shows that this hospital does not specialize in pulmonary or urinary diseases but that another hospital located in Denver does (Tr. 864), common sense would indicate that some significant portion of the patients of the former hospital might go elsewhere for treatment of pulmonary and urinary diseases. Furthermore, this study is limited to those employees who died of the specified diseases and apparently does not include respondent's former employees who may have died of such diseases. (R-159 at 2) Thus, there is an unstated assumption that the persons who died of the specified diseases, while employed by respondent, are representative of those who died of such diseases after termination of their employment with respondent. Both assumptions seem unrealistic.

More importantly, there is insufficient information contained in the study to indicate whether the figures relied

upon by respondent have any statistical validity. The critical information lacking is the number of coke oven employees who use the hospital. For all that is known, the five coke oven employees who reportedly died of the specified diseases, may have been the only coke oven employees for whom the hospital provided care. All that is stated is that the hospital provided care for 75% of respondent's employees. Thus, the 3.9% subgroup of the work force which are reported as being employed in the coke ovens may or may not be proportionately represented by the statistics of that hospital.

Finally, even assuming the statistical validity of the study, the study does not necessarily support Dr. Young's conclusions. Since five of the sixty-six employees who reportedly died of malignancies worked in the coke ovens for some period of time, such employees accounted for a disproportionate percentage of the deaths attributable to malignancies (7.6%) compared to their percentage of respondent's total work force (3.9%).[7]

The second study is also found to be insufficient to support the conclusions reached by Dr. Young. The entire report of this study is set out as follows:

> During the period 1971-1974, annual examinations were offered to all coke plant employees at no charge. These examinations include general examination, with particular inspection of the skin, 14 x 17 chest X-ray and urinalysis. A copy of the examinations for 1975 are not completed. During the 1971-1974 period,

[7] The study discounts three of these employees on the apparent basis that they were not regularly employed at the coke ovens, each having worked there less than a year. However, there is no evidence in this record which would support the conclusion that exposure to coke oven emissions for such a short duration could not have an adverse effect on such employees' health.

> only 10.15% of subject employees availed themselves to this offered service. These examinations resulted in discovery on one skin malignancy, a facial lesion which was removed and diagnosed as actinic in origin. (R-159 at 3)

This study is first insufficient because it is limited to examinations of only 10% of coke plant employees who were employed at the coke plant during a 4-year period. Second, it is found insufficient because Dr. Young himself considered it "of very little significance." (Tr. 866)

The third study consisted of the examination of the available death certificates of those who were employed by respondent in 1953. (R-159A at 1 and 2) Here, it is reported that out of a total employment base of 470 in 1953, of which 233 were employed on the ovens,[8] Dr. Young could trace the health and work histories of 363. (R-159 at 2) Of these, 86 had died and Dr. Young reviewed the certificates of 63 of such individuals, 23 of which were employed at the ovens. (R-159A at 2)

The primary statistic reported in this study is that 14.3% of "CF&I coke oven workers" died of malignancies. (R-159A at 3) Dr. Young then compares this figure with the "nationwide percentage of hospital discharge fatality rates in 1972" for malignancies which is reported at 14.2% of all ages and 17.4% of those 65 and over.[9] Dr. Young then concludes on the basis of this comparison "the percentage of deaths of CF&I coke oven workers due to malignancies is *below* the national norm." (R-159 at 4)

[8] Curiously, about half the work force is reported to have been employed on the coke ovens in 1953. (R-159 at 1) In contrast, the first study reports that "coke plant employees comprise 3.89% of CF&I's work force. . ." (R-159 at 3) Such an apparent statistical discrepancy, which was not explained in the record, raises yet another serious question as to the rehability of the statistics reported by Dr. Young.

[9] R-159A at 3.

This statement is simply untrue. Since there is no breakdown between age groups in Dr. Young's study, the relevant national figure would be the percentage of deaths attributable to malignancies for all ages – 14.2% which is exceeded by the reported figure for "CF&I coke oven workers" – 14.3%. (R-159A at 3)[10]

In further support of his conclusion, Dr. Young compares, in his supplemental statement, the percentage of deaths attributable to malignancies in Pueblo, Colorado (13.4%) with the comparable figure for Pittsburg, Pennsylvania (19.1%). (R-159A at 6) Based upon this comparison, he reports "markedly lower percentage figures for deaths due to malignancies in the area of CF&I's plant." (R-159A at 6) On its face, this comparison would seem to support Dr. Young's ultimate conclusion. However, the absence of a hospital in the Pueblo area that specializes in malignancies could result in the percentage of deaths reported for Pueblo being understated. Furthermore, if this figure is statistically valid, then the percentage of deaths attributable to malignancies in the Pueblo area (13.3%) when compared to respondent's "coke oven workers" (14.3%) demonstrates an increased incidence of such malignancies among respondent's coke oven workers.

For the foregoing reasons, it is found that the studies relied upon by Dr. Young [are] either unreliable or do not support his conclusion. Therefore, no weight will be given to Dr. Young's conclusion.

Having rejected respondent's arguments concerning the characterization of the violation, it is found that the violation is serious.[11] Further, taking into consideration the gravity of the violation, as well as respondent's size, history of previous violations and good faith, it is found that the proposed penalty of $1,000.00 is appropriate.

[10] Dr. Young further states that he believes the percentage of deaths due to malignancies among respondent's employees is actually lower than the 14.3%. This belief is based upon interviews with friends and relatives of 14 of the 23 persons who died whom Dr. Young could not locate death certificates. In the absence of any evidence that such information has any statistical reliability, this statement by Dr. Young will be disregarded in its entirety.

Size alone warrants the imposition of the maximum penalty ($1,000.00) in this case. Given the magnitude of respondent's operations, as indicated by its expenditures for pollution control, (R-41) there is a serious question of whether even the maximum penalty will operate to deter respondent from violating the standard in the future. Certainly anything less than the maximum penalty could not be expected to accomplish such deterrent effect.

The gravity of the violation, to the extent it even be quantified, would appear to range from moderate to high. This circumstance coupled with respondent's previous history of violations also support the imposition of the maximum penalty.

Consideration of respondent's good faith presents a more complex issue. Based upon the evidence in this record, it appears that respondent has made a good faith effort to provide protection to its employees and the surrounding community by installing an extensive system of engineering controls. In contrast, the record shows that with respect to initiating and implementing work practices which would provide an additional and essential measure of protection for its employees, respondent has done little more (and sometimes less) than is required by law. Such a checkered pattern of action hardly presents a compelling argument for reducing the penalty particularly when the other factors of penalty assessment are also taken into consideration.

[11] Since the determination to limit the regulated area was a conscious decision of respondent's management, the requisite knowledge is evident in this case.

Citation No. 2, Item No. 1

The second charge is an alleged willful violation of 29 C.F.R. § 1910.1029(b)(3) which provides:

> *Respirator Program* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

The specific allegations, as set out in Citation No. 2, Item No. 1, and modified at the outset of the hearing are:

> 29 C.F.R. § 1910.1029(b)(3): The employer did not institute a respiratory program in accordance with 1910.134 of this part, in that; Respiratory Training did not provide the employees an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> (a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.
>
> (b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit. (Tr. 12)

The specific provision of the respiratory protection standard which is claimed to have been violated is set out as follows:

> For safe use of any respirator, it is essential that the user be properly instructed in its selection, use and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, *have it fitted properly*, test its face-piece-to-face-seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere. (emphasis added, 29 C.F.R. § 1910.134(e)(5)).

Two separate and distinct theories of violation are advanced in support of this willful charge. First, it is argued that the above-quoted respiratory protection standard requires respondent to provide qualitative fit testing of its employees in a test atmosphere prior to their initial assignment into regulated areas. Second, it is argued that such standard requires respondent to provide its employees with a different type or size respirator if they fail the qualitative fit test that is provided.

Respondent readily concedes that some of its employees were not qualitatively fit tested in a test atmosphere prior to their initial assignment in regulated areas. (Respondent's Brief at 21) However, respondent argues that it did provide positive/negative pressure tests to employees at the outset of their employment and that such tests meet[] the requirements of the standard.

It is not disputed that respondent instructed its employees at the outset of their training on how to conduct a positive/negative pressure test. Even though this test is a qualitative test, it does not meet the "test atmosphere" requirements of 29 C.F.R. § 1910.134(e)(5) (Tr. 462). Thus, the training required under the cited standard requires qualitative testing in a test atmosphere which requirement is not met by merely providing positive/negative pressure tests.

The remaining question requires a determination as to when the prescribed training is to be given. Complainant and the AER concede the absence of express provision within the standard as to the timing of the prescribed training. Nevertheless, they argue that because of the grave risk inherent in exposure to coke oven emissions, the standard should be interpreted as requiring the provision of the prescribed training prior to initial assignment into regulated areas.

This argument is rejected. While it would seem eminently reasonable to adopt such a timing requirement for this industry, the Secretary did not see fit to do so. Instead, he adopted the general standard which is silent as to when training is to be provided. Since this standard is intended to apply in a variety of circumstances and industries, including those where the use of respirators would be limited to emergency use, it is believed unreasonable to interpret that standard as imposing a special timing requirement as to a particular industry. For this reason, it is found that the failure of respondent to provide the prescribed training to its employees prior to their initial assignment into regulated areas does not constitute a violation of the cited standard.

The second theory of violation focuses upon the "properly fitted" requirement of 29 C.F.R. § 1910.134(e)(5) which is incorporated into the coke oven emission standard by virtue of 29 C.F.R. § 1910.1029(g)(3). The former standard specifies in pertinent part:

> "training shall provide the men an opportunity . . . to have [the respirator] fitted properly."

As previously described, respondent's respirator training program included two forms of respirator testing. First, the employees were instructed on how to conduct a positive/negative pressure test. At a later date, respondent's training provided an opportunity for the employees to have their respirators fitted in a test atmosphere. However, the proof shows that when respondent's employees failed the latter test, they were not so informed, but were instead returned to the workplace with the very same respirator that had been used when the employee failed the test. (Tr. 78,251, C-12)

Respondent's defense to this charge is that by giving its employees the positive/negative pressure test, they had

complied with the standard. Hence, the fact that they did not provide different respirators to those who failed the banana oil test is inconsequential. As previously indicated, this argument ignores the additional requirement contained in the standard which requires respondent's training program:

> ". . . shall provide . . . an opportunity . . . to wear [the respirator] in a test atmosphere."

The banana oil test is one of the two most common types of test agents (the other being irritant smoke) which meets the test atmosphere requirement. (Tr. 459) Thus, in administering the banana oil test to its employees, respondent was meeting, not exceeding, the requirements of the standard.

More importantly, this argument fails to address the central issue of whether respondent complied with the "properly fitted" requirement of the standard. The undisputed facts are that respondent administered two tests. The first was the positive/negative pressure test, which is an unreliable means of testing fitness, compared to the other test administered by respondent, the banana oil test. Since the standard also requires that the training be administered by "competent persons," respondent can be expected to have recognized that the results of the banana oil test [were] a more reliable indicia of fitness than the positive/negative pressure test. In this case, twenty-eight of respondent's employees failed the banana oil test which gave respondent every reason to believe that the respirators provided to such employees did not fit properly. (C-12) Since the evidence shows that such employees were not provided with respirators with a different size face piece, respondent has violated 29 C.F.R. § 1910.134(e)(5) as charged.

The remaining arguments presented by respondent in defense to this charge are also unpersuasive. Respondent

argues that zero face-piece leakage is impossible to achieve. (Respondent's Brief at 26) Further, it argues that the banana oil test is an unreliable indicia of fitness because it is possible to fail the test even if the respirator fits properly. (Respondent's Brief at 27) The simple answer to this first argument is that respondent is not charged with having failed to provide respirators with zero face-piece leakage. Complainant's expert, Mr. Pritchard, readily conceded that zero face-piece leakage is impossible to achieve. Given this circumstance, it is obvious that the test upon which a determination of fitness is based, allows for some leakage. Otherwise, no one would pass the test.

Turning now to the second argument, there are at least two tests that respondent could use which meets the test atmosphere of the standard – the banana oil test and the irritant smoke test. (Tr. 459) Respondent elected to use the test which is the most subjective; hence, the least reliable of these two tests. (Tr. 461) Now, respondent argues that because of the test it elected to give lacks certainty as to its results, improper fitness should not be presumed.

This argument is rejected. Respondent is bound by the results of the test it elected to administer since the results of that test are the best indicia of fitness available. If respondent was dissatisfied with the results of such test it could have elected to re-test with the same or a different test agent. Since these test results show that the employees were not properly fitted, respondent was obligated to provide a different respirator to those that failed the test. Having failed to meet this obligation, respondent has violated the standard as charged.

It is further found that this violation is willful even under the standard of willfulness advanced by respondent. Respondent relies upon the following as a test of determining willfulness:

> The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer, who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

United States v. Dye Construction Company, 510 F.2d 78 (10th Cir. 1975).

The record in this case establishes that respondent exhibited an intentional disregard or a plain indifference to the standard. First of all, the requirements of the standard were explained to respondent long in advance of the inspection by the compliance officer. (Tr. 109, 113) Second, respondent's own training films make[] clear that respondent recognized its obligation to provide different respirators for those who failed the banana oil test. (Tr. 86) Given these circumstances there can be no question that respondent deliberately disregarded the requirements of the standard.

In determining the amount of penalty to be assessed for this willful violation, it is found that the maximum penalty of $10,000.00 proposed in the citation is appropriate. Here, respondent showed its employees a training film which explained the banana oil test that would be conducted. This film informed the employees that if they failed the test they would be provided with a different respirator. (Tr. 86) Contrary to this, respondent, in complete disregard to basic considerations of safety, did not inform those that failed the test of such event. (Tr. 78, 406) Instead, respondent returned them to the workplace with the very same respirator that had been determined by the test to improperly fit. (Tr. 78, 405) Thus, the employees, some of whom, worked in areas where the coke

oven emissions exceeded the permissible exposure limit (C-22) were misled by respondent into thinking the protection afforded was adequate, when, according to the best information available to respondent, it was not. Such cynical disregard for the safety of its workers and such a deliberate disregard for the standard itself makes even the maximum penalty seem pitifully inadequate.

Citation No. 3, Item No. 1

The three remaining charges involve alleged repeated violations. The first charge involves an alleged violation of 29 C.F.R. § 1910.1029(h)(1)(i) which provides:

> *Protective clothing and equipment*—(1) *Provision and use.* The employer shall provide and assure the use of appropriate protective clothing and equipment, such as but not limited to: (i) Flame resistant jacket and pants.

The specific allegation, as set forth in Citation No. 3, Item No. 1 is:

> 29 C.F.R. 1910.1029(h)(1)(i): The employer did not provide appropriate protective clothing to the following employees in the regulated area of the coke ovens in that, flame-resistant pants were not provided and used:
>
> (a) the bench helper on Battery B was not wearing flame-retardant pants, August 2, 1979;
>
> (b) the pipe fitter working on a push car, north of end D battery on August 2, 1979, was not w[e]aring flame-retardant pants.[12]

The evidence unequivocally establishes that both employees referred to in the citation worked in the regulated area on the day in question and both had not been provided flame-resistant pants. Thus, it is clear that respondent failed to comply with the standard. It is further clear that in regard to each of the two instances alleged, the failure to comply exposed the employee to a hazardous condition.

[12] A penalty of $1,400.00 is proposed.

In the first instance, the bench helper, Mr. Navara, was working in an area where he was not only exposed to coke oven emissions which could collect on his clothing, he was also exposed to extreme heat and flames em[a]nating from the coke ovens themselves. In the other instance, the pipe fitter, Mr. Franklin, was not exposed to the heat or flames but was exposed to the coke oven emissions which could collect on his clothing.

At the time of the inspection, Mr. Franklin was working at ground level on the push car, which was contaminated with coke oven emissions. Furthermore, that same day, Mr. Franklin's duties caused him to be on topside, an area which even respondent recognized as a regulated area.

Moreover, the evidence establishes that these were not isolated instances. Respondent had failed to provide protective clothing to its employees virtually the entire period the standard had been [in] effect. (Tr. 284-285, 293, 357-358, 410-411, 820-821) Furthermore, respondent's supervisory personnel did not require employees to obtain protective clothing before they worked in regulated areas. (Tr. 287, 412-413)

Respondent raises two arguments in defense to this charge. The first is:

> Contrary to the allegation . . . the standard does not specify that flame-retardant pants are required in the regulated area. (Respondent's brief at 38)

Respondent is correct in stating that the area in which flame-retardant (resistant) pants are required is not specified in the standard. However, the absence of such speci-

tivity does not constitute a defense. In the absence of language in the standard which would limit the areas in which such clothing is required, the prescribed clothing must be worn by all who come within the scope of the standard, to wit: "all coke oven workers." (Preamble, 41 Fed. Reg. at 46,775)[13] Thus, for those employees such as Mr. Franklin, whose duties may not have exposed them to flames and extreme heat but, who were exposed to coke oven emissions, respondent could have sought a variance which would have permitted it to provide pants other than flame-retardant pants. It may very well be that jeans would have been sufficient. Had respondent provided such alternative protective clothing, and had respondent provided for the cleaning and replacement of such clothing in accordance with 29 C.F.R. § 1910.1029(h)(2), a persuasive argument could have been made that the employees were not exposed to the hazard from which the provision was designed to protect. However, by failing to provide such alternative clothing the contaminated clothing worn by the employee was not cleaned and maintained in the prescribed manner. Instead, the contaminated jeans were taken to the employees home to be laundered which action resulted in exposing the employee and perhaps his family to coke oven emissions. (Tr. 287)

Respondent's second argument is that the prescribed protective clothing was available. (Respondent's brief at 38) This argument does not constitute a defense to the charge. Under the standard, respondent has an affirmative obligation to "provide and assure the use of" the prescribed protective clothing. The evidence unequivocally shows that respondent did not meet either of these obligations.

[13] Undoubtedly, the procedure contemplated by the Secretary for relieving the employer of this obligation in certain cases, is the variance procedure under 29 U.S.C. § 655(d).

The evidence relied upon in support of respondent's availability argument is the testimony of respondent's assistant superintendent who testified that after the inspection, he personally observed coveralls available for distribution in the supply room. (Tr. 754) Rather than constitute a defense to the charge, this evidence supports the conclusion that the prescribed protective clothing was withheld from the employees either deliberately or otherwise. For this reason, it is found that respondent violated 29 C.F.R. § 1910.1029(h)(1) as charged.

At the time of this violation, there was a Commission final order against respondent for a substantially similar violation. (C-6, Item No. 6, C-7 at p. 7, ¶ 12, AER Brief, Appendix A) Thus, this violation constitutes a repeated violation as contemplated by 29 U.S.C. § 666(a). *Potlatch Corp,* 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD, ¶ 23,294 (No. 16183, 1979)

The gravity of this violation would appear to be high, particularly in the instance of failing to provide flame-resistant pants to the bench helper who was directly exposed to the flames and extreme heat generated by the coke ovens. Taking this circumstance into account as well as the other statutory considerations which have been previously described, the proposed penalty of $1,400.00 for this violation seems more than reasonable and fair to respondent.

Citation No. 3, Item No. 2

The next charge concerns alleged incidents of smoking within the regulated areas in violation of 29 C.F.R. § 1910.1029(i)(5)(i). This standard provides:

> The employer shall assure that in the regulated area . . . smoking products are not present or used . . .

The specific allegation, as set forth in Citation No. 3, Item No. 2 is:

29 C.F.R. § 1910.1029(L)(sic)(4)(i):

> The employer did not enforce or ensure that smoking products would not be present and/or consumed in the regulated area:
>
> (a) The plant safety supervisor was smoking a cigarette topside at the north end of the north coal bin and bench level at the south door repair facility, August 2, 1979.
>
> (b) The turn foreman was smoking a cigarette topside at the north end of the north coal bin, August 2, 1979.

There is no dispute concerning the facts. On the day of the inspection, two of respondent's employees were observed smoking. The plant's safety director was observed smoking in the south door repair facility and the north end of the north coal bin (Tr. 59 & 248), and the turn foreman was observed smoking at the north end of the north coal bin area. (Tr. 248) Since both of these areas are located where coke oven emissions would be expected to be present, the failure to prohibit smoking exposed the employees to the hazard of ingesting such emissions.

Respondent's defense to this charge is that the two areas were not required to be designated as regulated areas; hence, smoking was not prohibited under the standard. However, having previoasly found that these two areas are required to be established as regulated areas, this defense cannot prevail. Thus, respondent, is found to have violated 29 C.F.R. § 1910.1029(i)(5)(i) as charged.

There was a Commission final order against respondent for a substantially similar violation at the time of this violation as well. (C-6, Item No. 49, C-7, ¶ 12, p. 7, AER Brief, Appendix A) Therefore, this violation is also found to be repeated.

There is, in this instance, a mitigating factor which warrants a lesser penalty than the $2,000.00 penalty that is proposed. Here, the reason respondent has violated the smoking prohibition is because it failed to establish the coal bin areas as a part of the regulated area, as required by 29 C.F.R. § 1910.1029(d)(2)(i). Since the latter failure constitutes a separate violation for which the maximum penalty of $1,000.00 has already been assessed, there is an element of penalty duplication presented here. For this reason, it is found that a penalty of $200.00 is appropriate for this violation.

Citation No. 3, Item No. 3

The final charge alleges a repeated violation of 29 C.F.R. § 1910.1029(k)(1)(ii) which provides:

> The training program shall be provided as of January 27, 1977 for employees who are employed in the regulated area at that time or at the time of initial assignment to a regulated area.

The specific allegation, as set forth in Citation No. 3, Item No. 3 is:

> 29 C.F.R. § 1910.1029(k)(1)(ii): The employer did not institute an effective training program for Coke oven employees working in the regulated area or at the times of initial assignment to the regulated area, in that:
>
> a) New employees, with no prior work experience in the regulated area, did not recieve adequate on-the-job training on the proper work practices and written procedures to minimize Coke oven emissions prior to assignment in the regulated area.

b) New employees did not receive adequate instructions on respirator usage, fitting and limitations prior to assignment in the regulated areas.

c) Employees with experience in the regulated area, did not receive adequate instructions and on-the-job training in the proper work practices and written procedures to minimize Coke oven emissions prior to assignment in a new job position they had not worked before.

It appears that the proponents of this citation have abandoned the allegation contained in subpart (b). This subpart, which deals with respirator training for employees prior to assignment in the regulated area, is expressly abandoned by the authorized employee representative (AER Brief at 35, n. 26). Complainant, in failing to address this allegation in his brief, also appears to have abandoned it. In any event, an independent review of the evidence supports the conclusion that the evidence does not support the allegation.

It is further found that the allegations of violation set forth in subpart (c) do not constitute a violation of the cited standard. The cited standard requires training "at the time of *initial* assignment to a regulated area." (29 C.F.R. § 1910.1029(k)(1)(ii), emphasis added) The substantive charge contained in subpart (c) does not go to the failure to provide training prior to the "initial assignment" but rather the failure to provide training after the initial assignment to a regulated area.

Thus, the only allegation contained in this item which comes within the parameters of the standard is contained in subpart (a) which charges respondent with having failed to provide two forms of training – on-the-job training and written procedures. However, to the extent that respondent is charged with having violated the standard by failing

to give on-the-job training, it appears that this charge too must fail. The content of the training which respondent is required to provide to its employees is set forth in 29 C.F.R. § 1910.1029(k)(1)(iv). Nowhere within the five enumerated categories of information which is required to be contained within the content of the training program is there provision for on-the-job training. Thus, the failure to provide on-the-job training does not constitute a violation of the cited standard.

Nevertheless, one of the categories of information which is required to be provided to new employees prior to their initial assignment to the regulated area is the written procedures pertaining to work practices. 29 C.F.R. § 1910.1029(k)(1)(iv)(d) requires respondent to inform each employee of "a review of all written procedures and schedules required under [29 C.F.R. § 1910.1029(f)]." Included under this latter standard is the requirement that all the written procedures pertaining to work practices be incorporated into the training program. 29 C.F.R. § 1910.1029(f)(7). In this case, Ms. Reynolds, an employee of respondent, was not provided an opportunity to review the written procedures pertaining to the position of bench helper prior to her initial assignment to the regulated area. (Tr. 437-439, C-5 (a)-(d)) Thus, respondent failed to comply with the cited standard and at least one employee was exposed to the hazard presented by respondent's noncompliance.[14]

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[14] Due to the immediate proximity of the bench helper to the coke oven doors, the employee was clearly exposed to the hazard the training standard was designed to control, namely, coke oven emissions. The proponents of this citation focus on what would appear to be an even greater hazard, namely, severe burns which this employee experienced as a result of being assigned to a work station for which she was improperly trained. (Tr. 440) Inasmuch as the training standard does not appear to contemplate protection from the extreme heat and

As is the case in the two preceding violations, there was a Commission final order against respondent for a substantially similar violation at the time of this violation. (C-6, Item No. 44a, C-7, ¶ 12, AER Brief, Appendix A) Respondent was previously cited for failure to comply with the 29 C.F.R. § 1910.1029(f)(7). (C-6, Item 44a) This provision requires, in part, an employer to incorporate all the written procedures specified therein, into the training program prescribed by subpart (k) of the Coke Oven Emissions Standard. Since this is a duplication of the training provision contained in subpart (k) which prescribes the conveyance of information pertaining to such written procedures to employees, the violations are substantially similar. Thus, this violation is also a repeat violation within the intent and meaning of the Act.

Finally, taking into account the statutory considerations previously discussed, the proposed penalty of $2,000.00 is found to be appropriate for this violation.

ORDER

Based upon the foregoing, IT IS ORDERED that:

1. Citation No. 1, Item No. 1, is *AFFIRMED*, and a penalty of $1,000.00 is *ASSESSED*.

2. Citation No. 2, Item No. 1, is *AFFIRMED*, and a penalty of $10,000.00 is *ASSESSED*.

3. Citation No. 3, Item No. 1, is *AFFIRMED*, and a penalty of $1,400.00 is *ASSESSED*.

4. Citation No. 3, Item No. 2, is *AFFIRMED*, and a penalty of $200.00 is *ASSESSED*.

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flames generated by the ovens, evidence of burns is irrelevant to the issue presented here.

5. Citation No. 3, Item No. 3, is *AFFIRMED*, and a penalty of $2,000.00 is *ASSESSED*.

/s/ Quentin P. McColgin
QUENTIN P. McCOLGIN
Administrative Law Judge

Dated: August 27, 1981

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 29 provides in pertinent part:

§ 651. Congressional statement of findings and declaration of purpose and policy

* * * * *

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

* * * * *

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated em-

ployees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On on [*sic*] before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize

themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as

practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards

in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial Review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

§ 658. Citations

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations

If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Posting

Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) Time for issuance

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

§ 659. Enforcement procedures

(a) Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice

If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) Notification of employer of failure to correct in alloted time period violation for which citation was issued and proposed assessment of penalty for failure to correct; time for notification of Secretary by employer of contest by employer of notification of failure to correct or proposed assessment; notification or proposed assessment as final order upon failure of employer to notify of contest

If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a

final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 666 of this title by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order,

based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

§ 660. (1982 & Supp. V 1987) Judicial review

(a) Filing of petition by persons adversely affected or aggrieved; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; appropriate relief; finality of judgment

Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28. Upon such filing, the court shall have jurisdiction

of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

(b) Filing of petition by Secretary; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; enforcement of orders; contempt proceedings

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) of this section shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 659 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

(c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or

has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

§ 661. Occupational Safety and Health Review Commission

(a) Establishment; membership; appointment; Chairman

The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms of office; removal by President

The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

* * * * *

(d) Principal office; hearings or other proceedings at other places

The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) Functions and duties of Chairman; appointment and compensation of administrative law judges and other employees

The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5 relating to classification and General Schedule pay rates: *Provided*, That assignment, removal and compensation

of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5.

(f) Quorum; official action

For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Hearings and records open to public; promulgation of rules; applicability of Federal Rules of Civil Procedure

Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) Depositions and production of documentary evidence; fees

The Commission may order testimony to be taken by deposition in any proceeding pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) Investigatory powers

For the purpose of any proceedings before the Commission, the provisions of section 161 of this title are hereby

made applicable to the jurisdiction and powers of the Commission.

(j) Administrative law judges; determinations; report as final order of Commission

A[1] administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Appointment and compensation of administrative law judges

Except as otherwise provided in this chapter, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5.

[1] So in original. Probably should be "An".

29 C.F.R. 1910.134 provides:

Respiratory protection.

(a) *Permissible practice.* (1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitutition of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to the following requirement

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

(3) The employee shall use the provided respiratory protection in accordance with instructions and training received.

(b) *Requirements for a minimal acceptable program.* (1) Written standard operating procedures governing the selection and use of respirators shall be established.

(2) Respirators shall be selected on the basis of hazards to which the worker is exposed.

(3) The user shall be instructed and trained in the proper use of respirators and their limitations.

(4) [Reserved]

(5) Respirators shall be regularly cleaned and disinfected. Those used by more than one worker shall be thoroughly cleaned and disinfected after each use.

(6) Respirators shall be stored in a convenient, clean, and sanitary location.

(7) Respirators used routinely shall be inspected during cleaning. Worn or deteriorated parts shall be replaced. Respirators for emergency use such as self-contained devices shall be thoroughly inspected at least once a month and after each use.

(8) Appropriate surveillance of work area conditions and degree of employee exposure or stress shall be maintained.

(9) There shall be regular inspection and evaluation to determine the continued effectiveness of the program.

(10) Persons should not be assigned to tasks requiring use of respirators unless it has been determined that they are physically able to perform the work and use the equipment. The local physician shall determine what health and physical conditions are pertinent. The respirator user's medical status should be reviewed periodically (for instance, annually).

(11) Approved or accepted respirators shall be used when they are available. The respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities. The U.S. Department of Interior, Bureau of Mines, and the U.S. Department of Agriculture are recognized as such authorities. Although respirators listed by the U.S. Department of Agriculture continue to be acceptable for protection against specified pesticides, the U.S. Department of the Interior, Bureau of Mines, is the agency now responsible for testing and approving pesticide respirators.

(c) *Selection of respirators.* Proper selection of respirators shall be made according to the guidance of American National Standard Practices for Respiratory Protection Z88.2-1969.

(d) *Air quality.* (1) Compressed air, compressed oxygen, liquid air, and liquid oxygen used for respiration shall be of high purity. Oxygen shall meet the requirements of the United States Pharmacopoeia for medical or breathing oxygen. Breathing air shall meet at least the requirements of the specification for Grade D breathing air as described in Compressed Gas Association Commodity Specification G-7.1-1966. Compressed oxygen shall not be used in supplied-air respirators or in open circuit self-contained breathing apparatus that have previously used compressed air. Oxygen must never be used with air line respirators.

(2) Breathing air may be supplied to respirators from cylinders or air compressors.

(i) Cylinders shall be tested and maintained as prescribed in the Shipping Container Specification Regulations of the Department of Transportation (49 CFR Part 178).

(ii) The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type compressor shall be used. Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape from a contaminated atmosphere in event of compressor failure, and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high-temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (d)(1) of this section.

(3) Air line couplings shall be incompatible with outlets for other gas systems to prevent inadvertent servicing of air line respirators with nonrespirable gases or oxygen.

(4) Breathing gas containers shall be marked in accordance with American National Standard Method of Marking Portable Compressed Gas Containers to Identify the Material Contained. Z48.1-1954; Federal Specification BB-A-1034a, June 21, 1968, Air, Compressed for Breathing Purposes; or Interim Federal Specification GG-B-00675b, April 27, 1965. Breathing Apparatus, Self-Contained.

(e) *Use of respirators.* (1) Standard procedures shall be developed for respirator use. These should include all information and guidance necessary for their proper selection, use, and care. Possible emergency and routine uses of respirators should be anticipated and planned for.

(2) The correct respirator shall be specified for each job. The respirator type is usually specified in the work procedures by a qualified individual supervising the respiratory protective program. The individual issuing them shall be adequately instructed to insure that the correct respirator is issued.

(3) Written procedures shall be prepared covering safe use of respirators in dangerous atmospheres that might be encountered in normal operations or in emergencies. Personnel shall be familiar with these procedures and the available respirators.

(i) In areas where the wearer, with failure of the respirator, could be overcome by a toxic or oxygen-deficient atmosphere, at least one additional man shall be present. Communications (visual, voice, or signal line) shall be maintained between both or all individuals present. Planning shall be such that one individual will be unaffected by any likely incident and have the proper rescue equipment to be able to assist the other(s) in case of emergency.

(ii) When self-contained breathing apparatus or hose masks with blowers are used in atmospheres immediately dangerous to life or health, standby men must be present with suitable rescue equipment.

(iii) Persons using air line respirators in atmospheres immediately hazardous to life or health shall be equipped with safety harnesses and safety lines for lifting or removing persons from hazardous atmospheres or other and equivalent provisions for the rescue of persons from hazardous atmospheres shall be used. A standby man or men with suitable self-contained breathing apparatus shall be at the nearest fresh air base for emergency rescue.

(4) Respiratory protection is no better than the respirator in use, even though it is worn conscientiously. Frequent random inspections shall be conducted by a qualified individual to assure that respirators are properly selected, used, cleaned, and maintained.

(5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

(i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly. Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also, the absence of one or both dentures can seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check. To assure proper protection, the facepiece fit shall be checked by the wearer each time he puts on the respirator. This may be done by following the manufacturer's facepiece fitting instructions.

(ii) Providing respiratory protection for individuals wearing corrective glasses is a serious problem. A proper seal cannot be established if the temple bars of eye glasses extend through the sealing edge of the full facepiece. As a temporary measure, glasses with short temple bars or without temple bars may be taped to the wearer's head. Wearing of contact lenses in contaminated atmospheres with a respirator shall not be allowed. Systems have been developed for mounting corrective lenses inside full facepieces. When a workman must wear corrective lenses as part of the facepiece, the facepiece and lenses shall be fitted by qualified individuals to provide good vision, comfort, and a gas-tight seal.

(iii) If corrective spectacles or goggles are required, they shall be worn so as not to affect the fit of the facepiece. Proper selection of equipment will minimize or avoid this problem.

(f) *Maintenance and care of respirators.* (1) A program for maintenance and care of respirators shall be adjusted to the type of plant, working conditions, and hazards involved, and shall include the following basic services:

(i) Inspection for defects (including a leak check),

(ii) Cleaning and disinfecting,

(iii) Repair,

(iv) Storage

Equipment shall be properly maintained to retain its original effectiveness.

(2)(i) All respirators shall be inspected routinely before and after each use. A respirator that is not routinely used but is kept ready for emergency use shall be inspected after each use and at least monthly to assure that it is in satisfactory working condition.

(ii) Self-contained breathing apparatus shall be inspected monthly. Air and oxygen cylinders shall be fully charged according to the manufacturer's instructions. It

shall be determined that the regulator and warning devices function properly.

(iii) Respirator inspection shall include a check of the tightness of connections and the condition of the facepiece, headbands, valves, connecting tube, and cannisters. Rubber or elastomer parts shall be inspected for pliability and signs of deterioration. Stretching and manipulating rubber or elastomer parts with a massaging action will keep them pliable and flexible and prevent them from taking a set during storage.

(iv) A record shall be kept of inspection dates and findings for respirators maintained for emergency use.

(3) Routinely used respirators shall be collected, cleaned, and disinfected as frequently as necessary to insure that proper protection is provided for the wearer. Respirators maintained for emergency use shall be cleaned and disinfected after each use.

(4) Replacement or repairs shall be done only by experienced persons with parts designed for the respirator. No attempt shall be made to replace components or to make adjustments or repairs beyond the manufacturer's recommendations. Reducing or admission valves or regulators shall be returned to the manufacturer or to a trained technician for adjustment or repair.

(5)(i) After inspection, cleaning, and necessary repair, respirators shall be stored to protect against dust, sunlight, heat, extreme cold, excessive moisture, or damaging chemicals. Respirators placed at stations and work areas for emergency use should be quickly accessible at all times and should be stored in compartments built for the purpose. The compartments should be clearly marked. Routinely used respirators, such as dust respirators, may be placed in plastic bags. Respirators should not be stored in such places as lockers or tool boxes unless they are in carrying cases or cartons.

(ii) Respirators should be packed or stored so that the facepiece and exhalation valve will rest in a normal position and function will not be impaired by the elastomer setting in an abnormal position.

(iii) Instructions for proper storage of emergency respirators, such as gas masks and self-contained breathing apparatus, are found in "use and care" instructions usually mounted inside the carrying case lid.

(g) *Identification of gas mask canisters.* (1) The primary means of identifying a gas mask canister shall be by means of properly worded labels. The secondary means of identifying a gas mask canister shall be by a color code.

(2) All who issue or use gas masks falling within the scope of this section shall see that all gas mask canisters purchased or used by them are properly labeled and colored in accordance with these requirements before they are placed in service and that the labels and colors are properly maintained at all times thereafter until the canisters have completely served their purpose.

(3) On each canister shall appear in bold letters the following:

(i)—

Canister for _____

(Name for atmospheric contaminant)

or

Type N Gas Mask Canister-

(ii) In addition, essentially the following wording shall appear beneath the appropriate phrase on the canister label: "For respiratory protection in atmospheres containing not more than _____ percent by volume of _____."

(Name of atmospheric contaminant)

(4) Canisters having a special high-efficiency filter for protection against radionuclides and other highly toxic particulates shall be labeled with a statement of the type

and degree of protection afforded by the filter. The label shall be affixed to the neck end of, or to the gray stripe which is around and near the top of, the canister. The degree of protection shall be marked at the percent of penetration of the canister by a 0.3-micron-diameter dioctyl phthalate (DOP) smoke at a flow rate of 85 liters per minute.

(5) Each canister shall have a label warning that gas masks should be used only in atmospheres containing sufficient oxygen to support life (at least 16 percent by volume), since gas mask canisters are only designed to neutralize or remove contaminants from the air.

(6) Each gas mask canister shall be painted a distinctive color or combination of colors indicated in Table I-1. All colors used shall be such that they are clearly identifiable by the user and clearly distinguishable from one another. The color coating used shall offer a high degree of resistance to chipping, scaling, peeling, blistering, fading, and the effects of the ordinary atmospheres to which they may be exposed under normal conditions of storage and use. Appropriately colored pressure sensitive tape may be used for the stripes.

29 C.F.R. 1910.1029 provides:

Coke oven emissions.

* * * * *

(g) *Respiratory protection*—(1) *General.* (i) Where respiratory protection is required under this section, the employer shall provide and assure the use of respirators which comply with the requirements of this paragraph (g). Compliance with the permissible exposure limit may not be achieved by the use of respirators except:

(*a*) During the time period necessary to install or implement feasible engineering and work practice controls; or

(*b*) In work operations such as maintenance and repair activity in which engineering and work practice controls are technologically not feasible; or

(*c*) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; or

(*d*) *In emergences.*

(ii) Notwithstanding any other requirement of this section, until January 20, 1978, the wearing of respirators shall be at the discretion of each employee where the employee is not in the vicinity of visible emissions.

(2) *Selection.* (i) Where respirators are required under this section, the employer shall select, provide and assure the use of the appropriate respirator or combination of respirators from Table I below.[*]

(ii) Not later than January 20, 1978, whenever respirators are required by this section for concentrations not greater than 1500 ug/m^3, the employer shall provide, at the option of each affected employee, either a particulate filter respirator as provided in paragraph (g)(2)(ii)(*b*) of

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* [Table I is moved to the end of 29 C.F.R. 1910.1029(g).]

this section, or a powered air-purifying respirator as provided in paragraph (g)(2)(i)(*a*) of this section.

(iii) The employer shall select respirators from among those approved for protection against dust and mist by the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part 11, except that not later than January 20, 1979, the employer shall select respirators from among those approved by NIOSH for protection against coke oven emissions.

(3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

(4) *Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

(ii) The employer shall allow each employee who uses a filter respirator to change the filter elements whenever an increase in breathing resistance is detected and shall maintain an adequate supply of filter elements for this purpose.

(iii) The employer shall allow employees who wear respirators to wash their face and respirator facepiece to prevent skin irritation associated with respirator use.

TABLE I – RESPIRATORY PROTECTION FOR COKE OVEN EMISSIONS

Airborne concentration of coke oven emissions	Required respirator
(*a*) Any concentration . .	(*1*) A Type C supplied air respirator operated in pressure demand or other positive pressure or continuous flow mode; or (*2*) A powered air-purifying particulate filter respirator for dust and mist or (*3*) A powered air-purifying particulate filter respirator or combination chemical cartridge and particulate filter respirator for coke oven emissions.
(*b*) Concentrations not greater than 1500 ug/m^3.	(*1*) Any particulate filter respirator for dust and mist except single-use respirator; or (*2*) Any particulate filter respirator or combination chemical cartridge and particulate filter respirator for coke oven emissions; or (*3*) Any respirator listed in paragraph (g)(2)(i)(*a*) of this section.

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In The

Supreme Court of the United States

October Term, 1989

ELIZABETH H. DOLE, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND CF&I STEEL CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief for Respondent, CF&I Steel Corporation

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QUESTION PRESENTED FOR REVIEW

Assuming that Petitioner's interpretation regarding 29 C.F.R. § 1910.1029(g)(3) was reasonable, did the Tenth Circuit Court of Appeals err by deferring to the Occupational Health and Safety Review Commission's interpretation of a regulatory standard promulgated under the Occupational Safety and Health Act, where the court found that the regulatory standard in question was ambiguous and that the Commission's interpretation was reasonable?

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Supreme Court Rule 29.1 1

MISCELLANEOUS

41 Fed. Reg. 46 pp. 742-90 5

S. 2193, 91st Cong., 1st Sess. Section 6 (1960), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) 2, 20

I. STATEMENT OF THE CASE

A. Parties and References.

Respondent, CF&I Steel Corporation[1], is a Colorado corporation incorporated under the laws of the State of Colorado and having its principal place of business in Pueblo, Colorado. Respondent shall be referred to throughout this brief as "CF&I".

Petitioner is the Secretary of Labor, Elizabeth H. Dole, and the United States Department of Labor, being represented by the Office of the Solicitor General, and shall be referred to throughout this brief as either Petitioner or Secretary.

References to the record or opinions below are made by indication of the page number contained in the Appendix portion of Petitioner's Petition for Writ of Certiorari (e.g., App. 1a).

B. The Occupational Safety and Health Act of 1970.

In 1970, Congress enacted the Occupational Safety and Health Act ("The Act"), 29 U.S.C. § 651 *et seq.*, to

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[1] In accordance with Supreme Court Rule 29.1, Respondent informs this Court that there are, at the present time, no parent companies of the Respondent; however, the following are subsidiaries of CF&I: Albuquerque Metals Company; CF&I Fabricators of Colorado, Inc.; CF&I Fabricators of Utah, Inc.; Colorado and Utah Land Company; The Colorado and Wyoming Railway Company; Denver Metals Company; The Fountain Sand & Gravel Company; Kansas Metals Company; Pueblo Metals Company; and Pueblo Railroad Service Company.

govern health and safety conditions in the workplace. While The Act delegated certain administrative functions to the Secretary of Labor, such as the promulgating of regulatory standards,[2] The Act also created an adjudicatory body known as the Occupational Safety and Health Review Commission ("Commission"). The Commission was composed of persons appointed by the President who were specially qualified by reason of training, education and experience to carry out the delegated functions of the Commission. 29 U.S.C. § 661(a). Congress' intention was that the Commission act in an adjudicatory capacity over challenged citations issued by the Secretary, 29 U.S.C. § 659(c); and further, that the Commission function as an autonomous, independent and quasi-judicial body, separate and distinct from the Secretary. See S. 2193, 91st Cong., 1st Sess. Section 6 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 462, 465 (1971) ("*Legislative History*"). This elaborate statutory scheme created a quasi-judicial body empowered to "affirm, modify or vacate" citations issued by the Secretary, 29 U.S.C. § 659(c); and the Commission was designed specifically to review the Secretary's actions in order to alleviate business concerns that the combining of prosecutorial and adjudicatory functions might produce biased decisions by the Secretary. See *Legislative History*.

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[2] 29 U.S.C. § 655 specifically enumerates the rulemaking procedures which the Secretary must follow in promulgating regulatory standards. These procedures require, among other things, publication of the proposed rule and an opportunity to submit written data, comments or objections.

The procedures for the issuance of a citation and the subsequent proceedings are very specific under The Act, and indicate the adjudicatory powers given to the Commission. When the Secretary believes, after investigation or inspection, that an employer has violated a regulatory standard, a citation is issued by the Secretary. 29 U.S.C. § 658(a). The Act requires that the citation describe with particularity the nature of the violation, including a reference to the specific provision of the regulatory standard alleged to have been violated. 29 U.S.C. § 658(a). The citation must also fix a reasonable time for the abatement of the alleged violation, and within a reasonable time after the issuance of the citation, the Secretary must notify the employer of the penalty, if any, proposed to be assessed.[3] 29 U.S.C. § 659. This assessment is based upon the Secretary's determination, in the first instance, of whether the alleged violation was "not serious", "serious" or "willful". See 29 U.S.C. § 659 and § 666.

If an employer wishes to contest the citation, penalty or abatement period, a notice of contest is filed with the Secretary. 29 U.S.C. § 659(c). Upon notice, the Secretary is required to advise the Commission immediately, and a hearing before an Administrative Law Judge ("ALJ") is scheduled. *Id*. At the hearing, the ALJ accepts testimony and other relevant evidence and, thereafter, issues findings of fact and conclusions with regard to the disputed

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[3] Pursuant to 29 U.S.C. § 666, the amount of a penalty is ultimately determined by the Commission, but it is proposed initially by the Secretary.

citation. See 29 U.S.C. § 659(c). The aggrieved party may then seek review of the ALJ's findings and conclusions by the Commission, which is composed of a panel of three members selected in accordance with 29 U.S.C. § 661(a). See 29 U.S.C. § 660(a). Based upon a documentary review of the ALJ's findings and conclusions, the Commission issues an order, either "affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief." 29 U.S.C. § 659(c). Review of the Commission's decision may be obtained in the appropriate United States Court of Appeals. See 29 U.S.C. § 660.

While the Commission was endowed under The Act with the complete array of adjudicatory powers and functions, the Secretary was given the responsibility of promulgating standards in accordance with the procedures enumerated in 29 U.S.C. § 655. These procedures require the normal array of rulemaking requirements entitling affected parties to proper notice and an opportunity to be heard. See *Id*. The Act further allows the Secretary to modify or revoke any occupational safety and health standard in accordance with the rulemaking procedures of The Act.[4] 29 U.S.C. § 655(b). This ability to amend

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[4] Contrary to Petitioner's contention at page 18 of its brief, the rulemaking process is not a "burdensome and time-consuming" process; but rather, it is a necessary process to ensure proper notice to affected employers with an opportunity to be heard, and further ensures that a standard will be limited to what it says and not what the Secretary would like it to say. *See Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1003 (9th Cir. 1986) (Secretary's interpretation not faithful to plain language of standard).

standards provides the Secretary with an additional avenue to correct by amendment what she may have failed to promulgate in the beginning, while at the same time affording affected persons notice of a proposed interpretation and an opportunity to be heard.

C. Pertinent Regulations.

In 1976, the Secretary promulgated a regulatory standard pertaining to the occupational exposure of employees to coke oven emissions. The standard became effective on January 20, 1977, after extensive rulemaking proceedings. 41 Fed. Reg. 46, 742-90 (1976). Among the various provisions within the standard was 29 C.F.R. § 1910.1029(g)(3) ("1029(g)(3)"), which pertained to a respiratory "program" for training and instructing employees:

> "(g) *Respiratory protection.*
>
> • • •
>
> (3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part."

The Secretary also promulgated a separate provision, 29 C.F.R. § 1910.1029(g)(4)(i) ("1029(g)(4)(i)"), pertaining to the use and proper fit of respirators:

> "(g) *Respiratory protection.*
>
> • • •
>
> (4) *Respirator usage.* (i) the employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly."

In the proceedings below, the Secretary maintained that the reference in 1029(g)(3) to "a respirator protection program in accordance with § 1910.134," incorporated all provisions of § 1910.134, including § 1910.134(e)(5) relating to the use of respirators.[5] Section 1910.134(e)(5), which was quoted and analyzed by the Tenth Circuit's opinion, specifically provides:

> "(e) *Use of respirators* . . . (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its facepiece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere."

The Secretary argued that the "fitted properly" reference contained in § 1910.134(e)(5) required an employer

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[5] The reference in 1029(g)(3) to § 1910.134 is of paramount importance to Petitioner's entire case. Petitioner argues that reference to "a program in accordance with § 1910.134" reasonably incorporates § 1910.134(e)(5) which is titled "use of respirators." However, the more reasonable interpretation, as the Commission concluded, would be that reference to a "program" was intended to incorporate the requirements of § 1910.134(b), which is specifically titled "Requirements for a minimum acceptable program." While a conclusion to this effect is not imperative to Respondent's defense in the underlying merits of this case, Petitioner's case is entirely dependent upon a finding that reference to a "program in accordance with § 1910.134" necessarily and reasonably incorporated § 1910.134(e)(5) regarding the "use of respirators."

to utilize qualitative fit testing in a test atmosphere[6] under 1029(g)(3) to ensure a proper fit.[7] The Secretary further argued that if an employee failed the qualitative fit test, an employer was required under 1029(g)(3), instead of 1029(g)(4)(i), to provide the employee with a properly fitting respirator or remove him from the workplace. See App. 39a.

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[6] There are various methods for testing a respirator to determine proper fit. One such test is a positive/negative pressure test, whereby the employee places the respirator on his face, inhales and exhales, and checks for any leakage of air along the seal. Another test is called atmospheric testing, whereby an employee wears a respirator in a room filled with noxious vapors, commonly known as "Banana Oil" vapors, and tries to detect an odor. While both tests are recognized by the applicable testing standards as acceptable tests, positive/negative pressure testing is not considered an atmospheric or qualitative test because it is not conducted necessarily in a "test atmosphere." See discussion at App. 36a-45a.

[7] The Commission rejected Petitioner's argument concluding that § 1910.134(e)(5) required use of a "test atmosphere" only for the training of employees:

> "[T]he source standard from which section 1910.134 was derived makes clear that use of a test atmosphere to determine respirator fit is not mandatory. In this case, the source standard is ANSI Z88.2-1969. Like section 1910.134(e)(5), the ANSI/source standard requires the use of a test atmosphere for the training of employees. ANSI Z88.2-1969, § 7.4. However, the ANSI source standard does not state that the employer must assure proper respirator fit during training; it also makes clear that a test atmosphere is not mandatory for determing facepiece fit." App. 42a.

It is these provisions of the standard and regulatory interpretations, together with the statutory framework of The Act, which provide the backdrop of the proceedings and holdings in this case.

D. Relevant Facts.

In 1979, the Secretary conducted an inspection of the CF&I coke oven facility located in Pueblo, Colorado. The Secretary found that CF&I had provided its employees with training and instruction on the use of respirators, and that CF&I had provided employees with a positive/negative pressure test with regard to the respirators. App. 3a. Despite these findings, the Secretary concluded that CF&I had willfully violated 1029(g)(3) for failing to institute a respiratory protection program, alleging that 28 employees had failed an atmospheric fit test and were not provided with a different respirator that would fit. App. 36a-37a. Rather than cite CF&I for a violation of 1029(g)(4)(i), the Secretary determined that the appropriate citation was for a willful violation of 1029(g)(3) and issued the following citation:

> "29 C.F.R. § 1910.1029(g)(3): The employer did not institute a respiratory program in accordance with 1910.134 of this part, in that; Respiratory Training did not provide the employees an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> (a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.

> (b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit."

Because CF&I believed that the providing of positive/negative pressure testing met the requirements of a satisfactory respiratory program, CF&I contested the Secretary's citation regarding a willful violation of 1029(g)(3). App. 77a, 78a-79a. A Notice of Contest was filed with the Secretary, and a hearing on the citation was set.

In accordance with The Act, a hearing on the contested citation was held before an ALJ. At the conclusion of the hearing, the ALJ rejected CF&I's contention that positive/negative pressure testing satisfied the requirements for a satisfactory respiratory program under 1029(g)(3). App. 79a. The ALJ concluded that 1029(g)(3), rather than 1029(g)(4)(i), required an employer to conduct atmospheric fit testing to assure that the employee's respirator was fitted properly. App. 79a-80a.

On review, the Commission disagreed with the conclusions of the ALJ. While finding that the facts pertaining to the citation were undisputed, the Commission concluded that 1029(g)(4)(i) was specifically applicable to the cited condition and, therefore, should have been cited by the Secretary instead of 1029(g)(3).[8] The Commission

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[8] The Commission specifically concluded:

> "In our opinion, Section 1910.1029(g)(4)(i) is specifically applicable to the cited condition and should have been cited by the Secretary instead of Section 1910.1029(g)(3)." App. 40a.

distinguished 1029(g)(3) as a training standard designed to instruct and train employees with regard to respirators; whereas, 1029(g)(4)(i) was specifically applicable to assuring proper respirator fit. App. 40a. The Commission reasoned that an interpretation of 1029(g)(3) requiring proper respirator fit would render 1029(g)(4)(i) superfluous and without meaning. App. 42a. The Commission further concluded that 1029(g)(3) should be interpreted to ensure that employers provided employees with proper training and instruction on the use of respirators, and that 1029(g)(4)(i) should be interpreted to pertain to the use of respirators, including proper respirator fit. App. 45a. Thus, because CF&I had implemented positive/negative pressure testing and instruction which satisfied the requirements of a proper respiratory protection program, the Commission determined that CF&I had not violated 1029(g)(3). App. 45a. In reaching its conclusion, the Commission rejected the Secretary's contention that the reference to § 1910.134 required an employer to assure proper fit of a respirator under 1029(g)(3):

> "In order to prove a violation of § 1910.134(e)(5) the Secretary must show that employees were not adequately instructed in the proper selection, use, and maintenance of respirators or were not permitted to handle the respirator under certain conditions. CF&I had a training program that included instruction in the selection and use of respirators and the avoidance of facepiece leakage. Employees were given an opportunity to handle the respirator under various conditions and to wear it in a test atmosphere under the guidance of an industrial hygienist. The fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate. We thus conclude that the Secretary failed to establish a violation of 29 C.F.R. § 1910.1029(g)(3)." App. 45a.

On appeal to the Tenth Circuit Court of Appeals, the conclusions and holding of the Commission were affirmed. In the opinion of the court, the regulations at issue were ambiguous and unclear as to whether 1029(g)(3) required atmospheric testing to ensure that respirators worn by employees fitted properly. App. 9a. The court considered and discussed the purpose and history behind The Act and the creation and functions of the Commission, ultimately concluding that when regulations are ambiguous, deference to the interpretation of the Commission is proper, insofar as the interpretation is reasonable. App. 5a-9a. The court also examined the language of the regulations and found that "the plain wording of the incorporated § 1910.134(e)(5) prescribed that atmospheric testing is mandated in the 'training' of employees." App. 10a. Thus, the court concluded that the Commission's interpretation of the regulation was reasonable, and that "if the Secretary maintains that a different result should prevail under OSHA, she should amend or clarify these regulations through the rulemaking process."[9] App. 11a.

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[9] While the court clearly determined that the Commission's interpretation of the regulatory provisions of the standard was reasonable, the Tenth Circuit expressed no opinion as to whether the Secretary's interpretation was reasonable.

II. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Contrary to Petitioner's arguments, this Court should deny the Petition for Writ of Certiorari review of the opinion of the Tenth Circuit Court of Appeals. Based upon the holding of the Tenth Circuit, Petitioner has overstated the actual issue presented by this Petition. When the issue is confined within the facts and circumstances of the regulatory provisions and limited to the actual holding of the Tenth Circuit, the issue presented is not as important as Petitioner would have this Court believe. Moreover, any decision by this Court with regard to the actual issue presented would be of limited precedential value, since deference to either the Commission's or Secretary's interpretation is not outcome determinative. Furthermore, contrary to Petitioner's claim, the opinion of the court of appeals was not erroneous.

1. The actual issue presented by the holding of the Tenth Circuit is not as broad as Petitioner would have this Court believe. In its opinion, the Tenth Circuit clearly limited the reach of its holding when it concluded:

> "We further stress that our holding not be construed as a carte blanche for the Commission to overturn settled regulatory interpretations of the Secretary. The Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. Because we find the regulations in the instant case to be ambiguous, we defer to the interpretation enunciated by the Commission, insofar as it is reasonable." App. 9a.

With this language, the court has instructed the Commission to afford the Petitioner's regulatory interpretation substantial weight. It is only when the interpretation is clearly wrong, or when the regulatory standard itself is ambiguous, that any issue regarding deference would arise. Therefore, the actual issue presented is not as broad as Petitioner contends; but rather, the issue of deference is limited to circumstances when the Secretary has promulgated an ambiguous regulatory standard, and both the Commission and Secretary have reached different, but reasonable, interpretations.

Moreover, the issues raised by the holding of the Tenth Circuit must be viewed in the factual setting from which the decision arose. As indicated by the court's decision, the issue was whether atmospheric testing was mandated by 1029(g)(3) to ensure a proper fit of a respirator. App. 2a. The court carefully scrutinized the language of the regulatory standard, as well as the interpretation given to it by the Commission. While the court concluded that the ambiguous regulatory standard was certainly subject to alternate interpretations, the court did not express an opinion as to whether the Secretary's interpretation was reasonable, or whether the Secretary's interpretation was as reasonable as the Commission's. Rather, the court deferred to the Commission's interpretation after concluding that *it* was reasonable, in light of the ambiguous regulatory standard:

> "The plain wording of the incorporated § 1910.134(e)(5) prescribes that atmospheric testing is mandated in the 'training' of employees. The Commission therefore concluded reasonably that CF&I was not required to utilize ongoing atmospheric testing to ensure the proper fit

> of each employee's respiratory. While it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language contained in 29 C.F.R. § 1910.1029, we defer to the interpretation chosen by the Commission." App. 10a - 11a.

Thus, the issue is not merely whether deference is properly owed to the Secretary over the Commission; but rather, since there has been no conclusion that the Secretary's interpretation of the regulatory standard was reasonable,[10] the issue presented is whether a reviewing circuit court properly defers under The Act to the reasonable interpretation of the Commission when interpreting an ambiguous regulatory standard. The limited holding of the Tenth Circuit's opinion, as well as the language of the ambiguous regulatory provisions of the standard at issue, limit the actual issue presented in this case.

Furthermore, the precedential value of any decision by this Court would be diminished by the fact that deference is rarely outcome determinative.[11] Contrary to the

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[10] Indeed, as CF&I has maintained throughout this case, the Secretary's interpretation that 1029(g)(3) pertains to proper use and fit of respirators is unreasonable in light of the clear language of 1029(g)(4)(i).

[11] There is no indication that deference in the present case was outcome determinative as Petitioner argues at Page 10 of its brief. As stated previously, the Tenth Circuit's opinion did not determine that the Secretary's interpretation was reasonable, but rather, the Court merely stated that an alternate interpretation could be reached. See App. 11a. Therefore, there is no basis to state that deference in the present case was outcome determinative, since the court could easily have concluded that the Secretary's interpretation of the regulatory standard was unreasonable.

Secretary's implication, "deference" does not equate to adoption. The fact that a reviewing adjudicatory body may afford deference to an agency's interpretation does not require the adjudicator to adopt the views of the agency. Indeed, the Tenth Circuit's opinion clearly instructed the Commission to afford substantial weight to the Secretary's interpretation of a regulatory standard, and to contravene only when the Secretary's interpretation was clearly wrong or in the presence of genuine ambiguity. App. 9a. Thus, deference would be outcome determinative only when the Secretary had promulgated an ambiguous regulatory standard which is subject to more than one reasonable interpretation, and the Commission had reasonably interpreted the standard in a way that produces a different outcome than the Secretary's interpretation, which also must be reasonable. There is little likelihood that such a scenario would arise with frequency, especially considering the Secretary's ability to amend and clarify ambiguous regulatory standards.

Also, a close examination of the case law cited by Petitioner in support of its claim that the circuits are severely divided actually reveals that deference is not outcome determinative under The Act, since circuit courts uniformly scrutinize and analyze the interpretation given by either the Commission or the Secretary. For example, Petitioner cites *Marshall v. Western Elec., Inc.*, 565 F.2d 240, 244 (2d Cir. 1977), for the proposition that the Second Circuit Court of Appeals always defers to the Commission; however, a cursory review of the case shows that the Second Circuit rejected the Commission's interpretation of a regulatory standard as unreasonable, and deferred to the Secretary's interpretation, finding

that "the Secretary's interpretation of the standard . . . was better calculated than the Commission's to achieve the congressional goal . . . ." *Id.* at 245. Similarly, in *Brennan v. OSHRC & Kesler*, 513 F.2d 553, 554 (10th Cir. 1975), the Tenth Circuit had deferred to the Secretary's interpretation in a prior decision, after considering the respective views of both the Secretary and the Commission, and finding that the Commission's interpretation was unsupported. *Id.* at 558. Thus, contrary to Petitioner's contention that a "deference rule" is often outcome determinative, case law indicates that the circuit courts uniformly consider both the Secretary's views and the Commission's interpretations, and after properly scrutinizing each, defer to the most reasonable interpretation under the facts and circumstances of each case.[12] Accordingly, by carefully scrutinizing the interpretation

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[12] Petitioner also cites *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-1001 (9th Cir. 1986), for the proposition that the Ninth Circuit always defers to the Commission's interpretation. In *Bechtel*, the court carefully considered the Secretary's interpretation of a regulatory standard and concluded that the Secretary's interpretation was not faithful to the plain language of the standard. *Id.* at 1003. The court then considered and agreed with the Commission's interpretation of the standard at issue.

Petitioner also cites *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978), for the proposition that the Sixth Circuit Court of Appeals always defers to the Commission's views over the Secretary's. Again, Petitioner misinforms this Court regarding the reach of the Sixth Circuit's holding. Although in a prior decision the Sixth Circuit had indicated that it would defer to the Commission's ruling, the court rejected the Commission's interpretation of a regulatory standard in *Usery*. *Id.* at 132. Thus, it is clear that circuit courts

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given by either the Secretary or the Commission, a "deference rule" would rarely, if ever, be outcome determinative.[13]

The precedential value of any decision in this case would also be limited to matters arising under The Act. As the Tenth Circuit's opinion indicates:

> "Although we hold that, under [The Act], deference is properly accorded to the regulatory interpretations of the Commission, we recognize that another result may prevail under a different statutory framework." App. 9a.

Thus, the unique statutory framework of The Act in creating the Commission and empowering it with independent and autonomous adjudicatory functions limits the precise reach of the court's holding to matters arising under The Act. This limitation, together with the previously specified limitations, severely reduces the precedential value of any decision this Court may render in the present action.

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carefully scrutinize either interpretation, despite a "deference rule", and defer to the most reasonable interpretation under the facts and circumstances of the given case.

[13] Petitioner also cites *United Steel Workers v. Schuylkill Metals*, 828 F.2d 314 (5th Cir. 1987), in support of the proposition that a deference rule is often outcome determinative. While deference in that case may have been outcome determinative, it should be noted that deference was given to the Secretary's interpretation over that of the Commission's. The court, however, did "consider carefully both the decision of the Commission and all the arguments of the appellee's." *Id.* at 322.

Contrary to Petitioner's argument, the need for uniformity is not as great as Petitioner would like this Court to believe. Under The Act, a contested citation is determined first by an ALJ, and subsequently by the Commission. Any party aggrieved by the holding of the Commission has a direct appeal to the circuit court of appeals, thereby bypassing the lower district courts. Therefore, since the Tenth Circuit's opinion has already directed the Commission to accord substantial weight to the interpretations of the Secretary, the only alleged need for uniformity lies with the 11 circuit courts, four of which Petitioner contends support a rule of deference to the Secretary. See Petitioner's brief at p. 10. Thus, it is Petitioner's contention that there is a need to instruct seven circuit courts to defer to the Secretary's interpretation of an ambiguous regulatory standard promulgated pursuant to The Act, even though the Commission's interpretation is reasonable.[14] The need for uniformity among the circuit courts as to this limited issue is not so great as to invoke this Court's discretionary power.

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[14] Based upon the holding of the Tenth Circuit, the precedential value of a ruling by this Court would be limited to a situation where (1) an ambiguous regulatory standard has been promulgated by the Secretary under The Act; (2) there is more than one reasonable interpretation of the same standard; (3) the Commission has afforded the Secretary's interpretation substantial weight; (4) the Commission determines that the regulatory standard should be interpreted differently than the Secretary's interpretation; (5) the Commission's interpretation, although different from the Secretary's, is reasonable; and (6) the application of the Commission's interpretation would produce a different outcome than application of the Secretary's interpretation. Only under this limited factual scenario would an opinion from this Court be of any precedential value.

In sum, the specific issues in this case, which have been limited by the Tenth Circuit's opinion and clear directive to the Commission, are not as important as Petitioner argues. The limited factual context of this case limits the precedential value of any decision this Court may render. Furthermore, deference does not equate to adoption of the Secretary's views, and thus, a reviewing court's deference to either the Commission's interpretation or the Secretary's interpretation would not be outcome determinative. The importance of this issue is further diminished by consideration of the Petitioner's ability to amend and clarify any ambiguous regulatory standard.

2. Even assuming *arguendo* the importance of the issue and that the issue is as broad as Petitioner argues, the opinion of the Tenth Circuit was not erroneous.[15] Under the provisions of The Act, the Commission is empowered to affirm, modify, or vacate any citation or proposed penalty. 29 U.S.C. § 659(c). According to the legislative history of The Act, Congress intended that the Commission function and exist as an autonomous and independent adjudicatory body, endowed with the normal complement of judicial powers. See 29 U.S.C. § 661. In this manner, the Commission functions in a capacity similar to a lower district court, exercising adjudicatory

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[15] While recognizing that the merits of the case should not be addressed in a Brief in Opposition to the Petition for Writ of Certiorari, a discussion of the underlying merits of the Tenth Circuit's opinion is necessary in order to address Petitioner's argument that the opinion of the Tenth Circuit was incorrect. See p. 11 of Petitioner's Petition for Writ of Certiorari.

functions over regulatory interpretations, and being subject to review by the appropriate circuit court of appeals. See 29 U.S.C. § 660(a). Thus, just as a lower district court would accord substantial weight to an agency's interpretation of a regulation under a different statutory framework, the Tenth Circuit has directed the Commission in the present case to accord substantial weight to the regulatory interpretations of the Secretary. Similarly, however, just as a lower district court is not required to adopt the agency's interpretation of an ambiguous regulation, neither should the Commission.

Furthermore, any holding that a circuit court of appeals should always defer to the Secretary's interpretation over the Commission's would undermine the entire purpose and function of the Commission. The Commission was designed to be an adjudicator in order to preclude the Secretary from being investigator, prosecutor, judge and jury. See 29 U.S.C. § 660(a); *Legislative History*. Requiring a circuit court of appeals to defer to the Secretary's interpretation over the Commission's would eliminate the intent of Congress to make the Commission an autonomous and independent adjudicatory body, and would be paramount to ordering a district court to accord deference to a prosecutor's interpretation of a criminal statute.[16] Indeed, if a circuit court is to defer to the

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[16] While recognizing that a prosecutor does not promulgate the statutes which she prosecutes, the distinction is of no importance since the purpose of the Commission under The Act was to alleviate concerns that combining prosecutorial and adjudicatory powers in the Secretary would result in biased decisions against employers. Allowing the Secretary to

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Secretary's biased interpretation of an ambiguous regulatory standard over the impartial assessment by the Commission, such a ruling would make the Commission a mere rubber stamp of the Secretary's views, thereby frustrating Congress' intent to create an independent and autonomous adjudicatory body.

As evidenced by the present case, deference to the Secretary's interpretation of a regulatory standard over that of the Commission would create the danger of rulemaking by adjudication. The Act sets forth specifically enumerated procedures for promulgating regulatory standards. 29 U.S.C. § 651(b). These procedures afford employers, among other advantages, the customary notice and opportunity to be heard. The enumerated procedures and the statutory framework of The Act are designed to protect employers from being penalized by after-the-fact interpretations of regulatory standards which were ambiguous in the first instance. Affording deference to subsequent interpretations by the Secretary of an ambiguous regulatory standard would create a pandora's box of dangers, including circumstances similar to the present case.[17] The more appropriate approach under

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rulemake by adjudication further deprives an employer of the right to notice and an opportunity to be heard, as well as the other benefits of the rulemaking process.

[17] The present case provides a classic example of the dangers associated with deferring to the Secretary's subsequent interpretation over that of the Commission. Although 1029(g)(4)(i) specifically addresses the conduct forming the basis of the citation, the Secretary instead determined that a

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The Act is to enforce the regulatory standards by what they say and not by what the Secretary would like them to say. As the Tenth Circuit noted, if the Secretary maintains that a different result should prevail under The Act, she should amend or clarify these regulations through the rulemaking process. App. 11a.

Accordingly, the opinion of the Tenth Circuit was not erroneous, even assuming the importance of the issue as stated by Petitioner. The language and purpose of The Act would be frustrated by deferring to the Secretary's interpretations over the Commission's, especially with regard to an ambiguous regulatory standard. Deference is properly owed to the independent and autonomous adjudicatory body empowered to affirm, modify or vacate a given citation. To hold otherwise would frustrate Congress' intent behind the creation of the Commission, and allow the Petitioner to rulemake by adjudication.

3. There are several other factors which support a denial of the Petition for Writ of Certiorari. CF&I's coke oven facility is no longer operational[18] and, thus, the

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citation for willful violation of 1029(g)(3) was appropriate. Rather than attempt to amend the citation, the Secretary merely chose to "interpret" 1029(g)(3) as prohibiting the same conduct as 1029(g)(4)(i). Allowing the Secretary to make "interpretations" which transform the clear language of a regulatory standard creates the danger of depriving employers of the very purpose behind the rulemaking procedures.

[18] In December 1982, CF&I ceased operations at the coke plant which is the subject of the underlying citation. Although there have been no coke oven operations by CF&I since that

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interpretation of the regulatory standards at issue are of no importance to the health and welfare of any employees of CF&I. Furthermore, if the same circumstances were to arise in another case, the Secretary could avoid the entire discrepancy by issuing a proper citation under 1029(g)(4)(i), instead of 1029(g)(3). Thus, any intent behind the regulatory standard could be furthered by issuance of a proper citation, rather than by seeking to obtain a Court ordered rule that deference is always owed to the Secretary over the Commission. A requirement that the Secretary should promulgate unambiguous regulatory standards, or at least cite applicable existing standards, would be more appropriate than granting certiorari review of the issue stated by Petitioner.

Also, it is important to note the absence of the Commission as a responding party to the present Petition for Writ of Certiorari, despite the probable importance of the issue as alleged by Petitioner. As an arm of the agency, the Commission is permitted to respond in these proceedings only with the approval of the Office of the Solicitor General, Petitioner's counsel in this matter. See 28 U.S.C.

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date, the $10,000 penalty prevents this case from becoming moot. However, a recent profit-loss statement generated by CF&I shows that the organization faces a current, unfunded pension liability in the amount of $138 million. In the event that CF&I would be unable to make its payment for the pension liability and the $10,000 fine would be discharged in bankruptcy, the issues before this Court would be moot, since CF&I's coke oven facility has been closed and the enforcement of the regulatory standards are no longer applicable.

§ 518 (1980). Without such authorization to the Commission, CF&I has been handed the task of defending the Commission's adjudicatory role in defense of a $10,000 penalty.

The entire issue as presented by Petitioner is nothing more than a power struggle over the Secretary's bruised ego. The Tenth Circuit's opinion clearly directed the Commission to accord substantial weight to the Secretary's regulatory interpretations. Dissatisfied with "substantial weight" by the Commission to her interpretations, Petitioner seeks a ruling by this Court regarding the respective powers of the Secretary and the Commission, at the expense of an entity whose coke oven facility has not been operational since December 1982. Petitioner's persistence in this matter, knowing that CF&I's coke oven facility is no longer operational and that the regulatory provisions are no longer applicable to this situation, underscores the internal power struggle within the agency.[19]

III. CONCLUSION

Contrary to Petitioner's arguments, the actual issue presented by the opinion of the Tenth Circuit Court of

[19] Petitioner's power struggle is particularly evident given that the Secretary has never sought certiorari review on the alleged "deference rule", despite her contention that the circuit courts are severely divided on the issue. Indeed, of the four cases allegedly deferring to the Commission's interpretation, Petitioner has never sought review in this Court, even though she contends that the issue of deference is of significant importance and often outcome determinative.

Appeals is not of such importance as to invoke this Court's discretionary review. The limited precedential value of any ruling by this Court on the actual issues presented by the opinions below support a conclusion that the Petition for Writ of Certiorari should be denied. Accordingly, based upon the foregoing arguments, CF&I respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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v.

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AND
CF&I STEEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In this case, the court of appeals held that, when the Secretary of Labor and the Occupational Safety and Health Review Commission issue conflicting interpretations of a Department of Labor regulation, judicial deference should be accorded to the Commission, rather than to the Secretary. Pet. App. 2a. In our petition, we demonstrated that this issue is of recurring importance to the administration of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.* We also showed that the issue has produced a widespread split in the courts of appeals. In response, respondent seeks to mini-

mize both the importance of the issue and the severity of the split in the circuits. Respondent's efforts are unavailing.

1. In seeking to minimize the significance of the court of appeals' holding, respondent contends, first, that the holding is limited because, under the court of appeals' analysis, the issue of deference will be pertinent only if the Secretary's "interpretation is clearly wrong," or "*when the regulatory standard itself is ambiguous.*" Br. in Opp. 13 (emphasis added). But as this Court has emphasized repeatedly, it is precisely when a regulation is ambiguous that the issue of deference arises, and precisely then that deference to the promulgating entity is most appropriate.[1] Far from limiting the scope of the court of appeals' holding, the requirement of deference to the *Commission* when the *Secretary's* regulation is ambiguous highlights the importance of that holding for the application of basic principles of judicial deference. See Pet. 11 n.8.[2]

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[1] See, *e.g.*, *Immigration and Naturalization Service* v. *Stanisic*, 395 U.S. 62, 72 (1969) ("Granting that this regulation and its successor provision are not free from ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it" in a particular manner); *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965) ("The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it."); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945) ("[A] court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."). Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[2] Respondent's emphasis on the court of appeals' requirement of Commission deference to the Secretary (Br. in Opp. 13, 24) similarly does not limit the significance of the decision because that requirement explicitly does not apply when a regulation is ambiguous. See Pet. App. 9a; Pet. 14 & n.11.

Respondent also seeks to minimize the importance of the court of appeals' decision because, according to respondent, the court of appeals did not explicitly hold that the Secretary's interpretation was reasonable. Br. in Opp. 13-14. But regardless of whether the court of appeals' opinion is read as having expressed a view on the reasonableness of the Secretary's interpretation,[3] the dispositive question for the court of appeals was whether the *Commission's* interpretation of the ambiguous regulation was reasonable. As the court stated, "in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission." Pet. App. 2a. In contrast, under a correct application of deference principles, the dispositive question should have been whether the *Secretary's* interpretation was reasonable. See, *e.g.*, *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 319 (5th Cir. 1987). Respondent does not and could not contend that the court of appeals held the Secretary's interpretation to be unreasonable; under a regime of deference to the Secretary, such a finding would be the only justification for rejecting the Secretary's interpretation.

Respondent further suggests that the issue in this case is limited because it is confined to "the unique statutory framework" of the OSH Act. Br. in Opp. 17. As we pointed out in our petition (at 16-17 & nn.15, 16), the OSH Act administrative structure has analogues in other statutory contexts, including the Federal Mine Safety and Health Act (30 U.S.C. 801 *et seq.*), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), and the Black Lung Benefits Act (30 U.S.C. 901 *et seq.*). Even if the issue were confined to the OSH Act,

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[3] We note that, in deferring to the Commission's interpretation, the court of appeals observed that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language." Pet. App. 11a.

however, review would still be warranted. The OSH Act is an important federal statute designed to ensure workplace safety (see generally 29 U.S.C. 651), and, as the numerous courts of appeals decisions addressing this subject reveal (see Pet. App. 4a-5a), the question of deference arises with frequency.

2. Respondent also seeks to minimize the split in the courts of appeals concerning this issue. Br. in Opp. 15-17. Respondent maintains that "the circuit courts uniformly consider both the Secretary's views and the Commission's interpretations, and after properly scrutinizing each, defer to the most reasonable interpretation under the facts and circumstances of each case." *Id.* at 16. In striking contrast to respondent's statement, the courts of appeals themselves have recognized a severe split of authority concerning the question of deference in the OSH Act context.[4] Additionally, respondent's statement that courts "uniformly" defer to the most reasonable interpretation is flatly inconsistent with courts of appeals decisions emphasizing that the interpretation of the entity receiving deference will prevail (if it is reasonable), even if it is *less* reasonable than the interpretation of the

[4] See, *e.g.*, *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d 61, 64 (1st Cir. 1985) ("The courts of appeals differ about the proper judicial attitude when OSRHC and OSHA are at odds about a regulation's meaning."); *Marshall* v. *Western Electric, Inc.*, 565 F.2d 240, 244 (2d Cir. 1977) (noting that "the courts have differed in deciding what deference to give the Commission's interpretations of health and safety regulations, especially when such interpretations conflict with those of the Secretary"); *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 319 (5th Cir. 1987) ("This is an issue over which the courts of appeals have splintered."); Pet. App. 4a ("Whether judicial deference under OSHA is accorded to the regulatory interpretations of the Secretary or the Commission is an issue upon which the federal circuits are split."). Cf. *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) ("Other Circuits are divided on the analogous question whether the Secretary or the Occupational Safety and Health Review Commission is due deference with regard to interpretation of the Secretary's regulations issued under the Occupational Safety and Health Act.").

entity not receiving deference.[5] Respondent's contention that "a 'deference rule' would rarely, if ever, be outcome determinative" (Br. in Opp. 17) is similarly belied by courts of appeals decisions explicitly holding that the issue of deference is outcome-determinative.[6]

As part of its attempt to minimize the split in the courts of appeals, respondent also seeks to recharacterize decisions from the Second, Sixth, and Ninth Circuits, and disputes our contention that those decisions support deference to the Commission. Br. in Opp. 15-16 & n.12. But several courts of appeals, including the court below, agree

[5] See, *e.g.*, *Brock* v. *Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 569-570 (11th Cir. 1987) ("Because the Secretary of Labor promulgates the regulations under the Occupational Safety and Health Act of 1970 * * * his reasonable interpretation of those regulations is controlling, even though his interpretation may not appear as reasonable as the Commission's interpretation") (footnote omitted); *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d at 319 ("We have held repeatedly that the *Secretary's* interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.") (internal quotation marks omitted). Indeed, respondent's statement that courts "uniformly" consider the reasonableness of both the Secretary's and the Commission's interpretations and defer to the most reasonable interpretation is inconsistent with respondent's characterization of the court of appeals decision in this very case. See Br. in Opp. 13 ("[T]he court did not express an opinion as to whether the Secretary's interpretation was reasonable.").

[6] See, *e.g.*, *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974) (statutory question can be answered "either way"; Commission's interpretation accepted, and Secretary's interpretation rejected, because of deference); *United Steelworkers*, 828 F.2d at 320 ("[i]n this case, the standard of review determines the outcome"; Secretary's interpretation accepted, and Commission's interpretation rejected, because of deference). Respondent notes the statement by the *Steelworkers* court that it had "consider[ed] carefully both the decision of the Commission and all the arguments of the appellee's" (Br. in Opp. 17 n.13); the court's statement regarding its careful consideration obviously did not detract from its explicit statement that deference to the Secretary was its *ratio decidendi*.

with our reading of those decisions.[7] Moreover, in addition to the Second, Sixth, and Ninth Circuits, both the court of appeals in this case and the Fourth Circuit have held that deference to the Commission is appropriate when the interpretations of the Secretary and the Commission conflict.[8] In stark contrast, the First, Fifth, Seventh, and Eleventh Circuits have held that deference to the Secretary is appropriate. See Pet. 10; Pet. App. 4a.[9] Thus, contrary to respondent's contention, the split in the courts of appeals is genuine and widespread.

3. Respondent also raises scattered additional objections to review of this case. Having vigorously litigated the case in the Commission and in the court of appeals, respondent now suggests that the closing of its facility in 1982, as well as its unfunded pension liability, may counsel against review. Br. in Opp. 22 & n.18. But as respondent recognizes (*id.* at 22 n.18), in view of the pendency of the $10,000 citation, this case is not moot. Respondent also suggests that this particular case is not significant in the context of the OSH Act because the Secretary could have invoked 29 C.F.R. 1910.1029(g)(4)(i), rather than 29 C.F.R. 1910.1029(g)(3) (with its incorporation of the general standard in 29 C.F.R. 1910.134). Br. in Opp. 23. Respondent overlooks the fact, however, that the Commission's interpretation of 29 C.F.R. 1910.134, now affirmed by the court of appeals under a deference-to-the-Commission theory, is applicable to a wide range of industries; it is not limited to the coke oven emissions context, the only context in which the option of invoking 29 C.F.R. 1910.1029(g)(4)(i) is available.[10] Finally, with regard to respondent's comments on the merits (Br. in Opp. 19-22), we discussed in our petition

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[7] See Pet. App. 4a (noting that "the Second, * * * Sixth, * * * and Ninth Circuits defer to the Commission"); *United Steelworkers*, 828 F.2d at 319 n.3 (noting that the "Second, * * * Sixth, * * * and Ninth Circuits defer to OSHRC"); *Donovan* v. *A. Amorello & Sons*, 761 F.2d at 64 (noting that the "Sixth Circuit * * * and possibly the Second Circuit seem to favor the Commission"); *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537 n.2 (noting that the "'Sixth * * * and possibly Second Circuits favor the Commission'"). Because the Ninth Circuit decision was issued after the decisions in *A. Amorello & Sons* and *Cathedral Bluffs*, it obviously could not be included in those decisions.

It is not surprising that these decisions characterized the Second, Sixth, and Ninth Circuits as favoring deference to the Commission, in view of the explicit language in the opinions from those circuits. See *Marshall* v. *Western Electric, Inc.*, 565 F.2d at 244 (2d Cir.) ("Although the courts have differed in deciding what deference to give the Commission's interpretations of health and safety regulations, especially when such interpretations conflict with those of the Secretary * * * this court has consistently held that its role 'is to decide whether the Commission's interpretation of the Regulation is unreasonable and inconsistent with its purpose * * *.'"); *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978) ("Where, as here, the Secretary of Labor and the Commission differ over the construction of the Act, we have indicated that the Commission's ruling is entitled to great deference."); *Brock* v. *Bechtel Power Corp.*, 803 F.2d 999, 1000 (9th Cir. 1986) ("[I]n a case such as this, where the Secretary and the Commission disagree as to the meaning and application of the regulation, the court need not grant * * * deference to the Secretary's interpretation. * * * Instead, we will defer to the Commission's expertise in exercising the independent adjudicatory function assigned it by the Act * * *."). Notably, respondent claims that *Usery* and *Marshall* are nevertheless inapposite because, in those decisions, the court went on to reject the Commission's interpretation as unreasonable. Br. in Opp. 15-16 & n.12. Respondent's objection, however, misunderstands the proper role of deference—although deference is extremely important and often outcome-determinative, it is not unbounded. See *Udall* v. *Tallman*, 380 U.S. at 16-17.

[8] See Pet. App. 2a; *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d at 1261-1262.

[9] Except for its comment regarding the Fifth Circuit's *Steelworkers* decision (see note 6, *supra*), respondent does not address the decisions holding that deference to the Secretary is required when the Secretary's interpretation and the Commission's interpretation conflict.

[10] Respondent also implies that the Commission interpreted 29 C.F.R. 1910.1029(g)(3) as incorporating *only* 29 C.F.R. 1910.134(b). Br. in Opp. 6 n.5. That implication is incorrect. See Pet. App. 40a-45a.

why we believe that the court of appeals' analysis is erroneous. See Pet. 11-18. Respondent's counter-arguments may properly be addressed in consideration of the merits, but they do not provide a basis for denying review.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

JUNE 1990

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In the Supreme Court of the United States

OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Secretary of Labor, rather than the Occupational Safety and Health Review Commission, is entitled to deference in the interpretation of a Department of Labor regulation if the Secretary's and the Commission's interpretations of the regulation conflict.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 891 F.2d 1495. The decision of the Occupational Safety and Health Review Commission (Pet. App. 14a-54a) is reported at 12 O.S.H. Cas. (BNA) 2067 and 1986-1987 O.S.H. Dec. (CCH) ¶ 27,691. The decision of the administrative law judge (Pet. App. 55a-91a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on December 22, 1989. On March 13, 1990, Justice White extended the time for filing a petition for a writ of certiorari to April 9, 1990. The petition for a writ of certiorari was filed on April 2, 1990, and was granted on June 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651(b)(3), 655, 658, 659, 660 and 661) are set forth in the appendix to the petition (at 92a-110a). Department of Labor regulations 29 C.F.R. 1910.134 and 1910.1029(g) are also set forth in the appendix to the petition (at 111a-123a).

STATEMENT

1. In 1970, Congress enacted the Occupational Safety and Health Act (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590 (29 U.S.C. 651 *et seq.*). The purpose of the legislation was "to assure so far as possible • • • safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. 651(b). The Act reflected a congressional determination that "the existing state statutory remedies as well as state common-law actions for negligence and wrongful death" had proven "inadequate to protect the employee population from death and injury due to unsafe working conditions." *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 444-445 (1977).

To further its goal of ensuring workplace safety, the OSH Act charges the Secretary of Labor with a broad range of regulatory and enforcement responsibilities. Most fundamentally, the Act "authoriz[es] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. 651(b)(3), 655. Employers must comply with these standards. 29 U.S.C. 654(a)(2).[1] In addition to promulgating standards, the Secretary has the authority to "modify or revoke" standards, and to grant individual variances. 29 U.S.C. 655(b), 655(d). Congress also charged the Secretary with enforcing the Act and empowered her to undertake various enforcement activities—conducting investigations and workplace inspections (29 U.S.C. 657); issuing citations to employers when she determines that an employer has violated the OSH Act or any standard, regulation, or order promulgated by the Secretary (29 U.S.C. 658); proposing civil penalties against cited employers (29 U.S.C. 659(a), 666); prescribing abatement periods for cited health and safety violations (29 U.S.C. 658(a), 659(b)); and seeking injunctive relief in federal court from imminent dangers to employee safety and health (29 U.S.C. 662(a)). See generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 3-4 (1985); *Whirlpool Corp.* v. *Marshall*, 445

[1] An employer also has a duty under the Act to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 U.S.C. 654(a)(1)); an employee, in turn, has a duty to "comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to [the Act] which are applicable to his own actions and conduct." 29 U.S.C. 654(b).

U.S. 1, 8-9 (1980); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 445-446.[2]

At the same time, Congress also created, in the OSH Act, the Occupational Safety and Health Review Commission (the Commission). The role of the Commission is described as "carrying out adjudicatory functions." 29 U.S.C. 651(b)(3). The Commission consists of three members, appointed by the President and confirmed by the Senate, who "by reason of training, education, or experience are qualified to carry out the functions of the Commission." 29 U.S.C. 661(a). The Act also provides the Chairman of the Commission with authority to hire administrative law judges to assist the Commission in performing its functions. 29 U.S.C. 661(e).

The Commission's sole responsibility is to adjudicate challenges to the Secretary's citations. The only rulemaking authority conferred upon the Commission by the OSH Act is "to make such rules as are necessary for the orderly transaction of its proceedings." 29 U.S.C. 661(g). The Commission has no jurisdiction over petitions to review the Secretary's promulgation of a safety or health standard; rather, the statute provides the courts of appeals with authority to review challenges to standards. 29 U.S.C. 655(f). The Commission also has no non-adjudicatory enforcement responsibilities.

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[2] The Secretary has delegated many of her OSH Act responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA), an agency within the Department of Labor that is responsible for enforcing the OSH Act. See generally Secretary of Labor's Order No. 12-71, 36 Fed. Reg. 8754 (1971); Order No. 8-76, 41 Fed. Reg. 25,059 (1976); Order No. 9-83, 48 Fed. Reg. 35,736 (1983).

A Commission proceeding arises from a challenge to a citation or notice of penalty by the Secretary. An employer may contest the Secretary's citation or notice of penalty before the Commission; in addition, an employee or employees' representative may challenge the time allowed for abatement in the Secretary's citation. 29 U.S.C. 659(c).[3] When a citation, penalty, or abatement date is contested, the Commission must "afford an opportunity for a hearing * * * [and] thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c); see also 29 U.S.C. 666(j).[4] The Commission has the power to compel attendance of witnesses, production of documents, and taking of evidence. 29 U.S.C. 661(h) and (i). After the Commission issues its decision, an aggrieved private party, or the Secretary, may seek judicial review of adverse Commission decisions in a specified court of appeals. 29 U.S.C. 660(a) and (b). "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. 660(a). See generally *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 446.

If the Commission affirms a citation, or if no challenge to a citation is filed, only the Secretary may seek its enforcement in the court of appeals. 29

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[3] If no challenge is filed to the Secretary's citation or notice of penalty, the citation or penalty itself becomes an order of the Commission. 29 U.S.C. 659(a).

[4] An administrative law judge presides at the hearing and issues a decision; further review by the Commission is discretionary. If no Commissioner directs further review within 30 days of the ALJ's decision, that decision becomes a final order of the Commission. 29 U.S.C. 661(j).

U.S.C. 660(b). All civil penalties assessed in final Commission decisions are payable to the Secretary for deposit into the Treasury of the United States, and are recoverable in a civil action brought by the Secretary in federal district court. 29 U.S.C. 663, 666(*l*); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 447.

2. In 1976, the Secretary determined that coke oven emissions are carcinogenic. Pursuant to her rulemaking authority under the Act, the Secretary promulgated a standard governing occupational exposure to coke oven emissions. 41 Fed. Reg. 46,742-46,790 (1976); 29 C.F.R. 1910.1029. See generally *American Iron & Steel Inst.* v. *OSHA*, 577 F.2d 825 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980). The standard requires that in "regulated areas" an employee's exposure to coke oven emissions be limited to a specified level. See 29 C.F.R. 1910.1029(c). The standard also requires the use of engineering and work practice controls to achieve that goal. 29 C.F.R. 1910.1029(f). Of particular relevance to this case, the standard permits the use of respirators as a method of compliance in certain circumstances—for example, when controls are not yet sufficient to reduce exposure to the permissible limit (29 C.F.R. 1910.1029(g)(1)). The coke oven regulation includes requirements concerning provision of respirators in such circumstances (29 C.F.R. 1910.1029(g)), and one of these requirements incorporates into the coke oven regulation a general regulation regarding respirators. See 29 C.F.R. 1910.1029(g)(3) ("The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part").[5]

[5] Section 1910.134 is a general OSHA standard that contains the basic requirements for acceptable respiratory protection programs and for proper selection, use, cleaning, and maintenance of respirators. The standard applies by its own terms when respirators are "necessary to protect the health of the employee." 29 C.F.R. 1910.134(a)(2). In addition, the standard is incorporated by substance- or industry-specific standards. Thus, several other standards, in addition to the coke oven emission standard, incorporate Section 1910.134 in whole or in part. See, *e.g.*, 29 C.F.R. 1910.1017(g)(3) (vinyl chloride), 1910.1043(f)(3) (cotton dust), 1910.1047(g)(3) (ethylene oxide), 1910.1048(g)(3)(i) (formaldehyde).

3. In August 1979, the Secretary conducted an inspection at respondent's coke oven facility in Pueblo, Colorado.[6] The Secretary and respondent had previously reached a settlement regarding citations issued to respondent for violations of the coke oven emissions standard. Pet. App. 19a. As a result of the August 1979 inspection, the Secretary issued three additional citations, one of which is involved in this case; it alleges violations of 29 C.F.R. 1910.1029(g)(3) and the general respiratory protection standard that it incorporates (29 C.F.R. 1910.134). Pet. App. 3a, 36a-37a, 90a-91a.

[6] References in this brief to respondent are to respondent CF&I Steel Corporation, which briefed and argued the case in the court of appeals. The Commission was a nominal respondent in the court of appeals (pursuant to Fed. R. App. P. 15(a)), but did not participate in those proceedings, in accordance with its statutory role as a purely adjudicatory agency. See generally *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643, 652-653 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982); *Marshall* v. *OSHRC*, 635 F.2d 544, 547 (6th Cir. 1980); *Marshall* v. *Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1184 (3d Cir.), cert. denied, 449 U.S. 1061 (1980); *Dale M. Madden Constr., Inc.* v. *Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974); see also *In re Perry*, 882 F.2d 534, 537 n.2 (1st Cir. 1989). But see *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1267 (4th Cir. 1974); *Diamond Roofing Co.*

The inspection disclosed that respondent had conducted two kinds of respirator tests with its employees. Pet. App. 79a. The first was a "positive/negative pressure test," in which a worker places the respirator on his face, inhales or exhales, and checks for leakage along the respirator seal; it is not conducted in a "test atmosphere." *Id.* at 3a, 59a. The second was a "banana oil" test, in which a worker, while wearing a respirator, is put in a "test atmosphere" and exposed to isoamyl acetate ("banana oil") in order to determine whether he can detect the odor of the chemical despite the respirator. *Id.* at 3a, 38a, 59a. The Secretary discovered that, during respondent's administration of the banana oil test, 28 of respondent's employees had detected banana oil, but that respondent had failed to furnish them with different respirators. Instead, respondent had simply sent the employees, with the same respirators, into a "regulated area." *Id.* at 3a, 38a-39a, 78a. Some of these employees were exposed to coke oven emission levels exceeding the permissible exposure limit. *Id.* at 81a-82a. Relying on the fact that "28 coke oven employees working in the regulated area exposed to coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit" (*id.* at 37a), the Secretary issued a citation for a "willful" violation[7] of 29 C.F.R.

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v. *OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir. 1976). Because this case raises an important question of the statutory allocation of responsibilities between the Secretary and the Commission, the Solicitor General has authorized the Commission to file a brief amicus curiae.

[7] A "willful" violation is in the most serious category of civil violation, and the highest civil penalties are authorized for such violations; only "repeated" violations carry equally

1910.1029(g)(3) and assessed the maximum penalty of $10,000.[8]

4. Respondent contested the citation. A Commission administrative law judge held five days of hearings in February 1980, and in August 1981 issued an opinion upholding the citation. The ALJ found that, as the Secretary charged, 28 employees detected banana oil in the fit test but were then sent into the coke oven areas with the same respirators. Pet. App. 79a-82a.

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severe penalties. 29 U.S.C. 666(a). Violations may also be characterized as "serious" and "not serious" (29 U.S.C. 666(b) and (c)) or as "de minimis" (29 U.S.C. 658(a)).

[8] The allegations of the pertinent citation state:

> 29 C.F.R. 1910.1029(b) [*sic*] (3): The employer did not institute a respiratory protection program in accordance with 1910.134 of this part, in that; Respirator Training did not provide the men an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.
>
> b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit.

OSHA Citation R5620-018, No. 2 (Aug. 29, 1979). The citation was subsequently amended to identify correctly the coke oven emissions respiratory program standard, which appears at 29 C.F.R. 1910.1029(g)(3), not 1910.1029(b)(3), and to substitute the word "employees" for the word "men" in the first sentence of the citation. ALJ hearing (Feb. 25, 1980), Tr. 12. The ALJ's quotation of the citation in his decision (Pet. App. 76a) correctly incorporates the substitution of the word "employees," but fails to correct the reference to 29 C.F.R. 1910.1029(b)(3).

The Secretary maintained that Section 1910.1029 (g)(3) of the coke oven emissions standard, by incorporation of the respiratory protection program requirement in 29 C.F.R. 1910.134(e)—1910.134(e)(5) in particular[9]—requires employers both to use a test atmosphere (as in the banana oil test) to assure that each employee's respirator fits properly, and to provide a different type or size respirator if an employee's equipment fails the test. Pet. App. 39a, 78a-79a. Respondent defended on the ground that the standard did not require testing in a test atmosphere at all, and that the positive/negative tests fully satisfied the standard. *Id.* at 78a-79a.

The ALJ agreed with the Secretary that the pertinent regulation—29 C.F.R. 1910.134(e)(5)—requires qualitative fit testing in a test atmosphere and imposes a requirement that a respirator fit properly. Pet. App. 79a. "Since these test results show that the employees were not properly fitted, respondent was obligated to provide a different respirator to those that failed the test." *Id.* at 80a. The ALJ also concluded that the violation was willful. In reaching that determination, he noted, first, that "the requirements of the standard were explained to respondent long in advance of the inspection by the [OSHA] compliance officer" (*id.* at 81a), and, second, that respondent's own training film recognized its obligation to provide different respirators to employees who failed the banana oil test. *Ibid.* He observed that respondent's "cynical disregard for the safety of its workers and * * * deliberate disregard for the stand-

[9] 29 C.F.R. 1910.134(e)(5) provides, in part, that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, * * * and, finally, to wear it in a test atmosphere." See Pet. App. 115a.

ard itself make[] even the maximum penalty seem pitifully inadequate." *Id.* at 82a.[10]

5. Five years later, in September 1986, the Commission reversed the ALJ's judgment. In a 2-1 decision the Commission concluded that Section 1910.1029(g)(3)—the coke oven provision incorporating the respirator standard—is a "training standard" and "does not require the employer to assure proper fit of an employee's respirator." Pet. App. 40a. The Commission emphasized that the next paragraph of the coke oven regulation—Section 1910.1029(g)(4)—explicitly requires that respirators fit properly; thus, in the Commission's view, Section 1910.1029(g)(3) could not, without redundancy, be read to require correct respirator fit as well. Pet. App. 40a, 41a-42a. The Commission also concluded that, by its own terms, the general respirator standard of Section 1910.134 does not impose a requirement that an employer assure respirator fit; the Commission stressed that Section 1910.134 refers to instruction and training and should be interpreted as a training program. Pet. App. 40a. Thus, the Commission interpreted Section 1910.134(e)(5) as "requiring the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper

[10] The ALJ upheld the citation only insofar as it alleged that respondent failed to provide properly fitted respirators to employees who failed the banana oil test, and did not affirm that portion of the citation challenging respondent's failure to test certain employees. See paragraph (b) of citation, *reprinted in* note 8, *supra*; Pet. App. 77a-78a. Although the Secretary disagrees with the ALJ's interpretation on this point, and believes that testing in a test atmosphere must be done before an employee's assignment to a regulated area, the Secretary has not challenged the ruling in this proceeding.

fit and how to obtain a face-piece seal" (Pet. App. 41a), and as requiring the employer to give an employee the opportunity to wear the respirator in a test atmosphere during training. *Ibid.* The Commission concluded, however, that it does not require the employer to insure that proper fit is achieved. *Ibid.*[11]

Since respondent's employees had received instruction and an opportunity to wear respirators in a test atmosphere, the Commission concluded that the requirements of Section 1910.134 had been met. Pet. App. 45a. According to the Commission, "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate." *Ibid.* Accordingly, the Commission vacated the citation, with one Commissioner dissenting.[12]

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[11] The Commission also supported its interpretation by reasoning that the national consensus standard for respiratory protection developed by the American National Standards Institute, which served as the source for 1910.134(e), merely advised, but did not require, respirator fit testing in a test atmosphere. Pet. App. 42a-43a. In addition, the Commission stated that the Secretary had taken inconsistent positions in compliance instructions concerning the requirement of a test atmosphere. *Id.* at 44a n.14.

[12] The dissenting Commissioner reasoned that, regardless of whether Section 1910.134 is a "training standard or a use standard," the Secretary had established a violation. Pet. App. 51a. He maintained that, even if the standard is construed as a training provision, the 28 employees who used respirators that did not fit "were not trained to comprehend the proper fit of respirators, or to use the respirators properly." *Id.* at 52a. He also agreed that the violation was appropriately characterized as "willful." Emphasizing that 28 employees failed the banana oil test and were then exposed to

6. The Secretary petitioned for review. In December 1989, the court of appeals denied the petition and upheld the Commission's determination. The court noted that an agency's interpretation of a statute is entitled to deference and must be accepted if reasonable, and that such deference is particularly appropriate where an agency "interprets its own administrative regulations." Pet. App. 4a. The court then observed that, although the Secretary had interpreted 29 C.F.R. 1910.1029(g)(3) as a testing standard for proper fit, the Commission had interpreted it as a training standard. "The question therefore arises: When the Secretary and Commission disagree over the interpretation of an OSHA regulation, which view prevails, *i.e.*, to whom is deference owed?" Pet. App. 4a. Observing that the question is "an issue upon which the federal circuits are split" (*ibid.*), the court concluded that, "in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission." *Id.* at 2a.[13]

Because in the court's view the statutory language did not settle the deference question, the court consulted the legislative history. It noted that Congress had decided against combining prosecutorial and adjudicative authority in the Secretary, and had created the Commission as an "autonomous, independent, and quasi-judicial body." Pet. App. 6a. The court emphasized that the "adjudicative function necessarily encompasses the power to 'declare' the

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toxic coke oven emissions above the permissible exposure limit without proper respiratory protection," he noted that the conduct "demonstrates, at the very least, plain indifference to employee safety." *Id.* at 54a.

[13] The various court of appeals decisions are cited at Pet. App. 4a-5a and Pet. 10 & n.7.

law." *Id.* at 7a. Thus, the court concluded that "where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission." *Ibid.*

The court of appeals took note of *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (*Pepco*), in which this Court concluded that the interpretations of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, were not entitled to deference because the Board has only adjudicative, and not policymaking, authority. The court of appeals viewed this Court's statement as "dicta" (Pet. App. 8a) and, for two reasons, distinguishable. First, Longshore Act adjudications are nonaccusatory, "whereas OSHA requires accusatory proceedings that may result in substantial penalties." *Ibid.* Second, Longshore Act claims are brought by private citizens, and not by the government. *Ibid.* The court concluded that the Longshore Act context does not "implicate" Congress's concerns about vesting prosecutorial and adjudicative functions in a single governmental entity, and that the "need for a strict separation of prosecutorial and adjudicative functions is therefore far more acute in the case of OSHA." *Ibid.*

The court also stated that its decision did not give "carte blanche" to the Commission; it observed that "[t]he Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity." Pet. App. 9a. However, if

there is "genuine ambiguity," the court held, the reasonable interpretation of the Commission will control. *Ibid.* The court also noted that, if the Secretary maintains that a different result should prevail, she may amend or clarify the regulations through rulemaking. *Id.* at 7a, 11a.

Turning to the merits of the specific interpretive question at issue, the court ruled that the Commission did not unreasonably interpret 29 C.F.R. 1910.1029(g)(3) to be a training standard rather than a testing standard to ensure proper fit. Pet. App. 9a-11a. The court found support for that position in 29 C.F.R. 1910.134(e)(5)'s reference to "training." At the same time, the court noted that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language." Pet. App. 11a. Nonetheless, applying its rule that it would defer to a reasonable Commission interpretation, the court upheld the Commission's decision.

SUMMARY OF ARGUMENT

It is the Secretary's, and not the Commission's interpretation of an OSH Act regulation that is entitled to deference. In according deference to the Commission, the court of appeals failed to recognize that the Secretary's interpretations of her own regulations under the OSH Act are entitled to deference because she is charged with policymaking and enforcement authority; the Commission, in contrast, is purely an adjudicatory agency.

1. An agency's reasonable interpretations of ambiguous provisions of a statute it is entrusted to administer are entitled to deference because those interpretations are an integral part of the agency's authority to implement statutory policy. See *Chev-*

ron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). Moreover, a heightened degree of deference is owed to an agency's interpretations of its own regulations precisely because the agency is the entity that promulgates and administers those regulations. *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Under these principles, it is the Secretary's interpretations that are entitled to deference. Congress designated the Secretary as rulemaker and enforcer under the Act, and it is she who implements statutory policy. Thus, the Secretary monitors workplaces across the country and makes investigative and prosecutorial decisions on a wide range of health and safety issues. As rulemaker, she exercises broad technical expertise in formulating standards; a necessary component of her rulemaking authority is the ability to issue reasonable interpretations of those standards for the guidance of employers and employees.

In contrast, the Commission is a purely adjudicatory agency with no policymaking responsibilities. It has no role in the formulation of standards. Its sole function under the Act is to adjudicate contested citations, which represent only a small proportion of the Secretary's enforcement activities. The Commission therefore does not have the broad perspective that the Secretary develops in her administration and enforcement of the Act.

2. The legislative history confirms that the Secretary is the policymaker under the Act and that her interpretations of her own regulations are therefore entitled to deference. Because Congress concluded that the Secretary would have the necessary expertise for rulemaking and that a division of authority

would hamper the Secretary's development of a cohesive enforcement program, Congress rejected bills that would have placed rulemaking in an independent board. Furthermore, the legislative history indicates that the Commission was established as an independent adjudicative body for the sole purpose of assuring due process and evenhanded treatment of employers in individual adjudications. Achievement of this purpose does not require or suggest a policymaking role for the Commission, and does not support a rule of judicial deference to the Commission, rather than the Secretary, in matters of administrative interpretation.

3. Finally, principles established in other contexts support the view that the Secretary, rather than the Commission, should receive deference. In the Longshore and Harbor Workers Compensation Act context, this Court has stated that the interpretations of the Benefits Review Board, an adjudicatory body analogous to the Commission, are not entitled to deference because that body has no policymaking authority. *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). So too, under the similar statutory scheme of the Federal Mine Safety and Health Act of 1977, the Secretary, as rulemaker and enforcer, rather than the Federal Mine Safety and Health Review Commission, as adjudicator, is entitled to deference when their interpretations conflict. These principles likewise apply to the OSH Act.

ARGUMENT

THE SECRETARY'S INTERPRETATION OF AN OSH ACT REGULATION IS ENTITLED TO JUDICIAL DEFERENCE

In concluding that a purely adjudicatory body (the Commission) is entitled to deference rather than the policymaking and enforcement authority (the Secretary), the court of appeals misconstrued the detailed statutory scheme and incorrectly applied the principles underlying this Court's decisions on deference. By denying deference to the Secretary's views, the lower court's ruling frustrates the Secretary's exercise of the rulemaking and enforcement duties that Congress has entrusted to her.

A. The Secretary, As The Policymaking And Enforcement Authority Under The Act, Is Entitled To Deference; The Commission, As A Purely Adjudicatory Body, Is Not Entitled To Deference

The assignment of responsibilities under the OSH Act identifies the Secretary as the entity entitled to deference. Judicial deference is rooted in a proper respect for the "legislative delegation to an agency" of policymaking responsibility. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984).[14] An im-

[14] See also *Adams Fruit Co.* v. *Barrett*, 110 S. Ct. 1384, 1390 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Department of Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990) ("As we emphasized in *Chevron*, when an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities. • • • That is a task infused with judgment and discretion, requiring the accommodation of conflicting policies that were committed to the agency's care.") (internal quotation marks omitted).

portant aspect of this respect for legislative delegation is the recognition that the entity designated by Congress to administer a statutory regime on a day-to-day basis gains expertise from its experience, and should be accorded interpretive discretion to discharge its duty.[15] Moreover, when construction of an agency's regulation, rather than of a statute, is at issue, "deference is even more clearly in order." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). See also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). As with deference to an agency's construction of a statute, deference to an agency's construction of a regulation is integral to the agency's policymaking and enforcement responsibilities. It rests on the fact that the interpretation has been provided by "the agency responsible for promulgating and administering the regulation" (*INS* v. *Stanisic*, 395 U.S. 62, 72 (1969))—that indeed the agency's interpretation is itself an exercise of those delegated responsibilities.[16]

[15] See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2679 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."); *Teamsters* v. *Daniel*, 439 U.S. 551, 556 n.20 (1979) ("[D]eference is a product of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time.").

[16] The settled principle is that "substantial deference" should be accorded to "an agency's construction of *its own* regulations." *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) (emphasis added). See also *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 566 (1980).

Under these principles, the Secretary, rather than the Commission, should receive deference in the interpretation of the Secretary's regulation. As this Court has observed, "[i]t is the Secretary, not the Commission, who sets the substantive standards for the workplace," and "enforcement of the Act is the sole responsibility of the Secretary." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 6-7. In contrast, the Commission's function "is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Id.* at 7. A necessary component of Congress's grant to the Secretary of broad and exclusive authority to define, investigate, and prosecute health and safety violations, see pp. 2-3, *supra*, is the authority to provide guidance for OSHA compliance officers and for affected employers and employees by developing reasonable interpretations of the standards and regulations issued under her rulemaking authority. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 (Commission may not review Secretary's decision to issue or withdraw a citation because the Secretary's authority to make such decisions is a "necessary adjunct" of her power to set substantive standards and issue citations). According deference to the Secretary, rather than the Commission, thus "leaves interpretive discretion where it normally resides, with the policymaker rather than the adjudicator." *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 n.2 (D.C. Cir. 1986) (Scalia, J.).[17]

[17] Deference is not unbounded, of course. An administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U.S. at 16-17; *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. at 1850. See also *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988) (Secretary's interpretation of own regulation should not be rejected, in the absence of a statutory or constitutional challenge, "unless [the] alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."). The court of appeals' suggestion that deference to the Commission is appropriate only when there is ambiguity in a regulation (Pet. App. 7a, 9a) does not limit the scope or significance of its decision; it is precisely when a regulation is ambiguous that the issue of deference arises, and precisely then that deference to the promulgating entity is most appropriate. See *INS* v. *Stanisic*, 395 U.S. at 72; *Udall* v. *Tallman*, 380 U.S. at 4; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 413-414. Cf. *Chevron*, 467 U.S. at 843.

Notwithstanding the Secretary's pivotal role, the court of appeals concluded that deference to the Commission was necessary to protect the Commission's adjudicatory function; the court emphasized that the Commission's authority to adjudicate encompasses a "power to 'declare' the law," and that deference to the Secretary's interpretation of her own regulations, rather than to the Commission's interpretation of them, would undermine that power. Pet. App. 6a-7a; see also *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d at 1262. This analysis is misconceived. As an initial matter, even an agency entitled to deference on judicial review does not conclusively "'declare' the law"; only the reviewing court may properly exercise that function. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568 (noting the "ultimate judicial responsibility to determine the law"). And the court of appeals' statement is incorrect even as to the more limited point that an adjudicatory agency must receive deference in its exposition of the governing standard. The Commission's pronouncements about the mean-

ing of the Secretary's regulations are not based on the exercise by the Commission of any delegated regulatory or policymaking function; as a result, those pronouncements do not qualify for deference under *Chevron* and its governing principles. Moreover, deference to the Secretary's reasonable interpretation of her regulations—by the Commission as well as by courts—is not inconsistent with the Commission's adjudicatory function.[18] Deference to a reasonable administrative interpretation is not denigration of adjudicative authority; it is, rather, the appropriate exercise of that authority in accordance with established principles. *Chevron*, 467 U.S. at 842-845; *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568.[19]

[18] It is well recognized that deference is owed to an administrative interpretation even if the agency in question does not have adjudicatory authority over the matter in question. See, *e.g.*, *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-140 (1944).

[19] Some courts have analogized the Commission to a district court, emphasizing that the Commission, like a district court, is an adjudicatory rather than policymaking body. See, *e.g.*, *In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989); *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643, 652 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982). See also Br. in Opp. 19 ("[T]he Commission functions in a capacity similar to a lower district court."). It is plainly not inconsistent with a district court's adjudicative function to defer to reasonable agency interpretations of its statutes or regulations. See, *e.g.*, *Whirlpool Corp.* v. *Marshall*, 445 U.S. at 8, 11, 22 (district court failed to give appropriate deference to Secretary's regulation interpreting a statute); *Udall* v. *Tallman*, 380 U.S. at 4 (district court gave appropriate deference to Secretary's interpretation). Similarly, while the Commission serves an important role as adjudicator under the Act, according deference to the Secretary does not undermine the Commission's exercise of that significant statutory responsibility.

It has been suggested that deference to the Commission is supported by the statutory requirement that the three members of the Commission be "persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission" (29 U.S.C. 661(a)). See *Dunlop* v. *Rockwell Int'l*, 540 F.2d 1283, 1289-1290 (6th Cir. 1976); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d at 1262. This suggestion also misapprehends the statute. By its terms, the purpose of the requirement of Section 661(a) is to assist the Commission in carrying out "the functions of the Commission"—namely, its "adjudicatory functions" (29 U.S.C. 651(b)(3)). The requirement does not itself expand the scope of those functions. To be sure, the requirement is designed to assure a degree of expertise in the Commissioners. Such expertise is clearly of value for members of a body whose factfinding in a complex field will be "conclusive" if supported by substantial evidence (29 U.S.C. 660(a))[20] and whose exposition of the pertinent issues will frequently be helpful to a reviewing court.[21] But the requirement does not provide a basis for giving deference to the Commission's interpretation of the Secretary's regu-

[20] See also 29 U.S.C. 659(c) (Commission's order shall be "based on findings of fact"); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 460 (upholding Commission's exercise of "administrative factfinding").

[21] See *Donovan* v. *A. Amorello & Sons*, 761 F.2d 61, 66 (1st Cir. 1985). As with review of a district court's legal conclusions, review of the Commission's legal conclusions should be undertaken with appropriate respect for the decision-maker, but with a recognition that its legal conclusions are subject to interpretive constraints, such as the deference due a policymaking entity in the interpretation of its rules.

lation, which the Commission has not promulgated and does not administer on an ongoing basis.[22]

If the Commission's interpretation, rather than the Secretary's, receives deference, the statutory structure will lead to anomalous results. For instance, the Secretary may file suit directly in district court to remedy discrimination against an employee for the assertion of his OSH Act rights. 29 U.S.C. 660(c). This litigation may involve a challenge to the Secretary's administrative interpretations, and it is clear that, in such litigation, the Secretary's administrative interpretations receive full judicial deference (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980)); if an administrative interpretation arises in a citation proceeding, however, the Commission's interpretation, rather than the Secretary's interpretation, would receive deference. The level of deference given the Secretary's interpretations should not vary according to the procedural avenues through which cases arrive in court.

Finally, deference to the Secretary's interpretation of her own regulations is supported by a number of

[22] If one governmental entity is a policymaking authority and a second governmental entity is required to defer or adhere to the policymaker's determination, the appropriate question on judicial review of the second entity's decision is the reasonableness of the policymaker's determination. See, *e.g.*, *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 778-779 (1984) (in statute requiring Federal Energy Regulatory Commission to adhere to Secretary of the Interior's determinations, question on review of FERC's decision is reasonableness of Secretary's determinations). In this context, then, the appropriate question for a reviewing court should be the reasonableness of the Secretary's interpretation; if the Commission has rejected a reasonable interpretation by the Secretary, the Commission's decision is not "in accordance with law." 5 U.S.C. 706(2)(A).

practical considerations. Because the Secretary crafted the regulation, she is in the best position to interpret its meaning. Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987) ("[T]he Secretary's view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation.").[23] Additionally, the Commission, as an institution with a solely adjudicatory function, has no opportunity to develop broad expertise in administering an occupational safety and health program, or in appreciating "the likely practical outcomes" of different interpretations of particular safety and health standards. *Donovan* v. *A. Amorello & Sons*, 761 F.2d at 66. Because it reviews only *contested* enforcement actions that the Secretary initiates—a small proportion of OSHA's overall

[23] In rejecting the Secretary's interpretation in this case, the Commission noted that the respirator standard was a pre-existing standard and adopted as a "national consensus standard," pursuant to 29 U.S.C. 655(a). Pet. App. 43a n.12. Two courts have held that the Secretary's interpretation of such a "national consensus standard" should receive reduced deference. See *Marshall* v. *Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp.* v. *OSHRC*, 573 F.2d 157, 160 (3d Cir. 1978). The selection of a pre-existing standard, however, is itself a policymaking exercise; the OSH Act empowered the Secretary to determine whether the promulgation of a pre-existing standard as a national consensus standard would "result in improved safety or health for specifically designated employees," and to determine, if pre-existing standards conflicted, "the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. 655(a). Thus, the Secretary's interpretation of the pre-existing standard which she has selected is itself entitled to deference.

activities [24]—the Commission's vision of the program is, of necessity, quite narrow.[25] The Secretary, in contrast, must exercise a much wider and sharper perspective in the course of developing new and revised standards, of monitoring workplaces across the country for compliance, and of making investigatory and prosecutorial decisions on a broad range of health and safety issues. Furthermore, a rule of deference to the Commission, rather than to the Secretary, would undermine the stability of the OSH Act regime. It would weaken the authoritative force of the Secretary's interpretations, and create incentives for challenges to the Secretary's interpretations. Such a result would hamper the policymaking and enforcement functions assigned to the Secretary by the OSH Act.

[24] In fiscal year 1988, according to Labor Department calculations, less than nine per cent of the Secretary's cited violations were contested; 174,396 violations were cited during that time. Current Report, 18 Occup. Safety and Health Rep. (BNA) 1668 (Mar. 1, 1989). (This percentage is higher than that of less than two per cent, cited in the petition (see Pet. 13 n.10), because it reflects use of contested *violations* as the numerator of the percentage; the figure in the petition reflects use of contested *cases* as the numerator, and a contested case may include more than one violation). Furthermore, most contested violations are resolved not through adjudication but through settlements or withdrawals of citations or notices of contest, as in *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 4-6 and cases cited therein.

[25] The Commission also cannot review claims that the Secretary improperly failed to issue a citation. See *Donovan* v. *OSHRC*, 713 F.2d 918, 927 (2d Cir. 1983) ("Only [the Secretary] has the authority to determine if a citation should be issued to an employer."). Therefore, its perspective is further skewed by its almost exclusive focus on charges that the Secretary's enforcement of the Act is too vigorous. Moreover, the Commission has no role outside the citation context and, as noted, does not even serve as adjudicator with respect to certain aspects of the Secretary's enforcement responsibilities. See, *e.g.*, 29 U.S.C. 660(c)(2) (authorization for Secretary to file discrimination actions in district court), 662(a) (authorization for Secretary to file motions in district courts to restrain imminent dangers). Thus, the Commission has little familiarity with these enforcement activities.

Several of these practical implications are highlighted by this case. According to the evidence in the record, as related by the Commission, respondent received explicit advance warning that respirators should be fitted in banana oil or irritant smoke, and respondent's training film included an explicit statement that a different respirator would be provided if an employee detected the presence of banana oil. Pet. App. 38a; see also Pet. App. 81a. Also according to the evidence in the record, 28 employees who detected banana oil were sent into regulated areas with the same respirators, and some were exposed to carcinogenic emissions in levels higher than the permissible exposure level. *Id.* at 38a-39a, 52a, 54a, 79a-82a. The court of appeals nevertheless rejected the Secretary's interpretation of her regulation without ever concluding that her interpretation was unreasonable. Although recognizing that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language" (*id.* at 11a), the court upheld the Commission's rejection of the Secretary's citation simply because it could not "be said that the Commission's interpretation of [the regulation] * * * was unreasonable." *Id.* at 10a. In consequence, under the court of appeals' holding, respondent in this case would escape liability despite the failure to provide different respirators to employees exposed to impermissible levels of emissions and despite the explicit prior warnings by the Secretary's compliance officer.

B. The Legislative History Confirms That Policymaking Authority Resides With the Secretary; Therefore Deference is Owed To Her Interpretations

Since, in our view, the statutory structure plainly identifies the Secretary as the entity entitled to deference, we disagree with the conclusion of the court of appeals that resort to the legislative history is necessary. Pet. App. 6a. But in any event, that history confirms that the Secretary should receive deference in the interpretation of her regulations.

The OSH Act's legislative history reveals that Congress forged a compromise between bills creating different administrative schemes: the Administration bill, supported by business interests, proposed creation of separate rulemaking and adjudication boards, both independent of the Secretary, while the Senate and House committee bills, supported by organized labor, combined all three functions in the Secretary. See S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15, 54 (1970), and H.R. Rep. No. 1291, 91st Cong., 2d Sess. 17-20, 24 (1970), *reprinted in* Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 148, 155, 193, 847-850, 854 (Comm. Print 1971) [hereinafter *Legislative History*].[26] Senator Javits

[26] Other bills adopted a third approach. They would have created a single independent board with both rulemaking and adjudicatory authority, while lodging enforcement authority with the Secretary. S. 2788, 91st Cong., 1st Sess. (1969), *reprinted in Legislative History* 31-72; H.R. 13373, 91st Cong., 1st Sess. (1969) *reprinted in Legislative History* 679-720. These bills died in Committee. See generally *Marshall* v. *Sun Petroleum Prods. Co.*, 622 F.2d 1176, 1182 (3d Cir.), cert. denied, 449 U.S. 1061 (1980).

proposed in committee a compromise whereby the Secretary would regulate and enforce, and an independent three-person panel would adjudicate. S. Rep. No. 1282, *supra*, at 55, *reprinted in Legislative History* 194. Although his proposal was not accepted by the committee, Senator Javits was later successful in securing its adoption on the Senate floor. *Legislative History* 380-393, 462-479.[27] The House-passed bill, meanwhile, included provisions for both an independent standards board and an independent adjudicatory panel (*id.* at 1094-1101, 1112-1113), but the conference committee adopted the Senate version, placing rulemaking and enforcement authority with the Secretary, and creating the Commission as an independent adjudicatory agency (*id.* at 1146-1147, 1157-1169).

The court of appeals' brief discussion of the legislative history addresses only the congressional decision not to vest the Secretary with adjudicatory authority. Pet. App. 6a-7a. For purposes of the issues presented here, however, the critical point is that Congress delegated exclusive policymaking authority to the Secretary, and explicitly rejected proposals to remove that authority from the Secretary. This express choice to lodge rulemaking powers with the Secretary, rather than with the Commission or another independent board, provides powerful support for the conclusion that Congress did not intend the Commission to exercise broad policymaking responsibilities through its adjudications. See *Donovan* v. *A. Amorello & Sons*, 761 F.2d at 65.

[27] Before the adoption of Senator Javits' amendment, Senator Dominick proposed on the Senate floor a substitute bill, which would have created a separate board for promulgating safety and health standards; the substitute was defeated. *Legislative History* 421-424, 449.

Furthermore, the reasons advanced in the legislative history for these two decisions— the retention of policymaking authority in the Secretary and the delegation of adjudicatory authority to the Commission—also support the conclusion that the Secretary is the entity entitled to interpretive deference. The decision to retain policymaking authority was supported for the very reasons this Court has stressed as bases for deference—congressional confidence in the Secretary's policymaking expertise and the congressioal goal of a close relationship between policymaking and day-to-day administration and enforcement. Noting that proponents of an independent policymaking board had argued that such a board "would represent expertise in the field of occupational safety and health," the Senate committee responded that such a board was not necessary because the "professional and technical expertise * * * involved in the development and promulgation of a standard * * * would be fully available to the Secretary, both [through] members of his staff, and [through] members of advisory committees." S. Rep. No. 1282, *supra*, at 8, *reprinted in Legislative History* 148. Similarly, in rejecting the contention that an independent board was necessary for "a separation of powers" under the Act, the Senate committee emphasized that "a sounder program will result if responsibility for the formulation of rules is assigned to the same administrator who is also responsible for their enforcement and for seeing that they are workable and effective in their day-to-day application, thus permitting cohesive administration of a total program." S. Rep. No. 1282, *supra*, at 8, *reprinted in Legislative History* 148. This decision by the Senate committee to retain policymaking authority in the Secretary ultimately prevailed on the

Senate floor and in conference, and the committee's explanation is thus entitled to considerable weight.

The legislative history also reveals that the reasons for creating the Commission were very different from the reasons for co-ordinating policymaking and administration in the Secretary. The Commission was created to ensure both fairness and the appearance of fairness in individual adjudications. The author of the compromise, Senator Javits, explained that, although due process could be achieved in adjudication by either the Secretary or an independent entity, adjudication by an independent entity "more closely accords with traditional notions of due process" (*Legislative History* 392); see also S. Rep. No. 1282, *supra*, at 55 (statement of Sen. Javits), *reprinted in Legislative History* 195, and would provide reassurance to the regulated community (*Legislative History* 393, 469).[28] At the same time, Senator Javits urged,

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[28] Senator Javits frequently referred to the Commission's power as "quasi-judicial." See, *e.g.*, S. Rep. No. 1282, *supra*, at 54 (statement of Sen. Javits), *reprinted in Legislative History* 193; *Legislative History* 464 (floor debate); *id.* at 465 (floor debate). Although Senator Javits and other legislators sometimes used the term "enforcement" in describing the Commission's adjudications (see, *e.g.*, *Legislative History* 464), they clearly were not referring to any non-adjudicatory enforcement role. Cf. *Cuyahoga Valley Ry.*, 474 U.S. at 6-7 ("[E]nforcement of the Act is the sole responsibility of the Secretary. * * * The Commission's function is to act as a neutral arbiter."). Similarly, although Senator Javits analogized the Commission to the Federal Trade Commission (*Legislative History* 462, 465), his specific example made clear that he was referring to the Occupational Safety and Health Review Commission's adjudicatory role, not to any policymaking role. See *id.* at 462 (referring to "the same type of authority that the Federal Trade Commission exercises: the power to issue a cease and desist order which, if challenged within a

his proposal would lead to a more efficient administrative process.[29] Thus, a separate adjudicative body would "preserve due process more easily, and thereby instill much more confidence in the whole program in workers and businesses alike." *Legislative History* 393 (Sen. Javits). Explanations of the conference agreement, which accepted the Javits compromise of a separate agency for adjudication but not for policymaking, similarly described the Commission's role as ensuring fairness in individual cases.[30]

Thus, the legislative history confirms that Congress did not intend the Commission to have broad interpretive powers. Like the statute itself, this legislative history indicates instead that the principal purpose of creating the Commission was to ensure fair and even-handed treatment of individual employers who

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given period of time, can be reviewed by the Circuit Court of Appeals").

[29] Senator Javits cited two reasons for his conclusion that adjudication by the Commission would be more expeditious than adjudication by the Secretary: (1) Commission orders would be enforceable before judicial review (under the committee bill, contested orders would not be enforceable until after judicial review), and (2) Commission review of ALJ decisions would be discretionary. See *Legislative History* 392; S. Rep. No. 1282, *supra*, at 55 (statement of Sen. Javits), *reprinted in Legislative History* 194.

[30] See, *e.g.*, *Legislative History* 1147 (Sen. Williams) (separation of adjudicative role intended "to provide every assurance that fairness and due process would be fully served"). Critics of the combination of all functions in the Labor Department had objected that management would perceive the Secretary, "traditionally * * * the voice of labor in the administration" (*id.* at 982 (Rep. Anderson)), as unfair to businesses that were cited for violations (*id.* at 473 (Sen. Holland)).

have been cited for violations.[31] This goal is clearly consistent with a rule requiring deference to the Secretary's interpretations of her own regulations. Congress could, of course, have achieved the same purpose of ensuring due process and fairness for individual employers by providing for challenges to citations in district courts. That Congress chose to provide the alternative of independent administrative adjudication should not change the applicable decisional principles.

C. Principles Established In Analogous Contexts Support The View That Deference Is Owed To The Policymaking Entity (the Secretary), Rather Than the Adjudicatory Entity (the Commission)

Principles established under analogous statutory schemes also support the conclusion that the Secretary and not the Commission should receive deference. For instance, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, creates an administrative scheme similar to the OSH Act in that one entity (the Secretary of Labor) is given policymaking and program functions (33 U.S.C. 939), and another entity (the Benefits Review Board) is given adjudicatory authority (33 U.S.C. 921(b)). See *Oil, Chemical & Atomic Workers* v. *OSHRC*, 671 F.2d 643, 652 n.12 (D.C. Cir. 1982) ("The role of [the Commission] closely parallels the functions of the Benefits Review Board.") In reference to the Benefits Review Board and its adjudicatory role

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[31] Senator Javits distinguished between the powers granted to the Secretary and the Commission on that very basis: "The enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberate act. There are serious penalties involved for the individual enterprise. It is a case by case proposition. It does not apply across the board to every member of industry." *Legislative History* 464.

under the LHWCA, this Court emphasized that "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co. (Pepco)* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).[32]

Despite the court of appeals' asserted distinction (Pet. App. 7a-8a), this principle is fully applicable here because Congress assigned policymaking responsibilities to the Secretary, rather than the Commission. In particular, nothing in the distinction relied on by the court of appeals—that, under the OSH Act, the Secretary has prosecutorial as well as rulemaking authority (see Pet. App. 8a; page 14, *supra*)—undercuts this basic identity. In *Pepco*, this Court based its conclusion not on the factors emphasized by the court of appeals, but on the lack of a policymaking role for the Board in the structure created by Congress—a fundamental characteristic that also holds for the Commission in the OSH Act context.[33]

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[32] Unlike the Occupational Safety and Health Review Commission, the Benefits Review Board's members are appointed by the Secretary of Labor; its decisions nevertheless constitute final agency action from which judicial review may be sought by the Secretary and other aggrieved parties. 33 U.S.C. 921(c). The Black Lung Benefits Act of 1972 (30 U.S.C. 901 *et seq.*) incorporates this structure. See 30 U.S.C. 932(a) (incorporating by reference certain administrative provisions of the Longshore Act). Under both the Longshore Act and the Black Lung Benefits Act, the Secretary has delegated her authority to the Director, Office of Workers' Compensation Programs. 20 C.F.R. 701.201, 701.202.

[33] Since *Pepco*, the weight of appellate authority in LHWCA and Black Lung benefits cases has concluded that deference should be accorded to the views of the Director, and not the Board, in cases of conflict over statutory or regulatory interpretation between the Director and the Board. See *Lukman* v. *Director, OWCP*, 896 F.2d 1248, 1250-1251 (10th Cir. 1990); *Director, OWCP* v. *Palmer Coking Coal Co.*, 867 F.2d 552, 555 & n.3 (9th Cir. 1989); *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987); *Peabody Coal Co.* v. *Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Bethlehem Mines Corp.* v. *Director, OWCP*, 766 F.2d 128, 130 (3d Cir. 1985); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983). Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Court adopts Secretary's reasonable interpretation of black lung regulation that she has promulgated, but also notes Board's agreement with Secretary); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (shared "practice" of Board and the Director is entitled to deference). But see *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 288 (6th Cir. 1988) (neither the Board nor the Director should receive deference); *Director, OWCP* v. *General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990) (neither the Board nor the Director should receive deference, at least where Director's "position has not been articulated in a more objective context through the promulgation of regulations").

In addition, the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. 801 *et seq.*, established a structure for the mine safety and health program that is similar in many respects to the OSH Act.[34] Under that statute, the Secretary of Labor is entrusted with rulemaking, investigative, and prosecutorial authority (30 U.S.C. 811, 813-816), and the Federal Mine Safety and Health Review Commission has adjudicative powers (30 U.S.C. 815, 823). Courts have concluded that, when their interpretations conflict, the Secretary, as policymaker and enforcer, rather than the Mine Safety and Health Review Commission, as adjudicator, receives deference. See *Secretary of Labor* v. *Cannelton Indus., Inc.*, 867

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[34] The Mine Act also contains certain important differences from the OSH Act. See, *e.g.*, *Donovan* v. *Dewey*, 452 U.S. 594 (1981) (differences in statutes lead to differences in Fourth Amendment requirements).

F.2d 1432, 1433, 1435 (D.C. Cir. 1989); *Brock* v. *Peabody Coal Co.*, 822 F.2d 1134, 1145-1146 & n.41 (D.C. Cir. 1987); *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537.[35] Additionally, the legislative history of the Mine Act (which was passed seven years after the OSH Act) explicitly confirms that the Secretary should receive deference as an aspect of her policymaking and administrative responsibilities: "Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977).[36]

In the OSH Act, as in these other contexts, the policymaker should receive judicial deference, particularly in the interpretation of the policymaker's regulations. Indeed, the contrary rule favoring deference to the Commision, when its interpretation conflicts with the Secretary's, treads heavily on the policymaking and regulatory role Congress sought to lodge in the Secretary. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 ("a procedure

[35] Courts have also suggested that, in the absence of a contrary interpretation by the Secretary, the Commission's interpretation receives deference (*Simpson* v. *Federal Mine Safety & Health Review Comm'n*, 842 F.2d 453, 458 (D.C. Cir. 1988)), and that, if the Commission's interpretation agrees with the Secretary's, it receives heightened deference (*Clinchfield Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, 895 F.2d 773, 776 (D.C. Cir. 1990)).

[36] See also 1 C.F.R. 305.86-4 (recommendation of Administrative Conference of the United States that legislation adopting a split-enforcement model of agency adjudication explicitly provide that the adjudicatory agency should defer to the rulemaking agency's interpretations).

[that] would * * * allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute * * * [would be] a commingling of roles that Congress did not intend"). In this case, for instance, the court of appeals' decision would permit respondent to escape liability even though the court did not find the Secretary's interpretation unreasonable. And liability would not be imposed even though (1) respondent had been explicitly warned by the Secretary's compliance officer that respirators should be fitted in banana oil (or irritant smoke), (2) respondent then informed its employees that a new respirator would be provided if they detected banana oil, and (3) respondent's employees detected banana oil, were not given different respirators, and were then exposed to levels of carcinogenic coke oven emissions exceeding the permissible exposure level. Because reasonable interpretations of a regulation are an integral part of policymaking and enforcement, and because Congress entrusted to the Secretary policymaking and enforcement responsibilities, the Secretary, and not the Commission, should receive deference in the interpretation of the Secretary's own regulations.[37]

[37] Although the court of appeals stated that it was "certainly possible to reach an alternate interpretation of the ambiguous regulatory language" (Pet. App. 11a), it did not explicitly address the reasonableness of the Secretary's interpretation. As a result, this Court may wish to remand the case to the court of appeals for consideration of that issue. See, *e.g.*, *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 397 (1989); *Seatrain Shipbuilding Co.* v. *Shell Oil Co.*, 444 U.S. 572, 597 (1980).

In our view, the Secretary's interpretation of her regulation should be sustained because it is not "plainly erroneous or inconsistent with the regulation." *Udall* v. *Tallman*, 380 U.S. at 17. In support of the reasonableness of the Secretary's interpretation, we note that the Commission's principal basis

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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for rejecting that interpretation (Pet. App. 40a, 41a-42a)—the specific fit requirement in another provision (29 C.F.R. 1910.1029(g)(4)(i))—is misconceived. Nothing prevents overlapping prohibitions in statutes or regulations. Cf. *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979); Pet. App. 52a (dissenting opinion). Moreover, the Commission's cramped interpretation of 29 C.F.R. 1910.134, if accepted, would necessarily govern not only when the regulation applies in the coke oven emissions context, but also when 29 C.F.R. 1910.134 applies of its own force (cf. note 5, *supra*), and when it applies to regulations that incorporate it and do not have specific fit requirements (*e.g.*, 29 C.F.R. 1910.1017(g)(3)).

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QUESTIONS PRESENTED

Respondent, CF&I Steel Corporation, submits that the following questions are presented for review:

1. Did the judgment of the Tenth Circuit Court of Appeals correctly affirm the order of the Occupational Safety and Health Review Commission vacating the citation issued by the Secretary of Labor against the Respondent, CF&I Steel Corporation?

2. Did the Tenth Circuit Court of Appeals correctly defer to the reasonable interpretation of the Occupational Safety and Health Review Commission over the unreasonable interpretation of the Secretary of Labor, when the two agencies differed on the interpretation of the ambiguous regulatory provisions at issue?

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Section 1910.1029(g)(4)(i) ..... *passim*

MISCELLANEOUS:

S. 2193, 91st Cong., 1st Sess. § 6 (1969); *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (1971) 15, 16

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Occupational Safety and Health Act of 1970 and the regulatory standards are set forth in the Appendix portion of the Petition for Writ of Certiorari. References are made throughout this brief to Petitioner's Appendix by citing *App.* and the appropriate page number.

There are three regulatory standards relevant to the issues before the Court. The first two standards set forth below, 29 C.F.R. § 1910.1029(g)(3) and 29 C.F.R. § 1910.1029(g)(4)(i), were promulgated by the Secretary as a part of the coke oven regulations. The third standard below, 29 C.F.R. § 1910.134(e)(5), was a national consensus standard authored by the American National Standards Institute and adopted by the Secretary without the notice and comment rulemaking procedures of the Act:

29 C.F.R. § 1910.1029(g)(3):

> (3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

29 C.F.R. § 1910.1029(g)(4)(i):

> (4) *Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

29 C.F.R. § 1910.134(e)(5):

> (e) *Use of respirators.* (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons.

> Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and finally, to wear it in a test atmosphere.

STATEMENT OF THE CASE

This case arises under the Occupational Safety and Health Act of 1970 ("the Act"), and involves a citation[1] issued by the Secretary of Labor to CF&I Steel Corporation.[2] The Occupational Safety and Health Review Commission vacated the citation, holding that the Secretary had failed to prove that CF&I was not in violation of the regulatory standards cited by the Secretary. The Secretary disagreed with the Commission's interpretation of the regulatory standards and appealed the Commission's final order. On appeal, the Tenth Circuit Court of Appeals affirmed the Commission's decision, holding that the decision was based

[1] Although the Secretary issued more than one citation initially, Petitioner concedes in footnote 10 of its brief that there is only one part of one citation at issue in the present case.

[2] In accordance with Supreme Court Rule 29.1, CF&I informs this Court that there are, at the present time, no parent companies of CF&I; however, the following are subsidiaries of CF&I: Albuquerque Metals Company; CF&I Fabricators of Colorado, Inc.; CF&I Fabricators of Utah, Inc.; Colorado and Utah Land Company; The Colorado and Wyoming Railway Company; Denver Metals Company; The Foundation Sand & Gravel Company; Kansas Metals Company; Pueblo Metals Company; and Pueblo Railroad Service Company.

upon a reasonable interpretation of the regulatory standards at issue. The Secretary has sought certiorari review by this Court.

In 1979, the Secretary conducted an inspection of CF&I's coke oven plant which is located in Pueblo, Colorado. Based upon her belief that 28 employees had failed their respirator fit test and were allowed to enter a regulated area, the Secretary cited CF&I for a violation of 29 C.F.R. § 1910.1029(g)(3). Specifically, the citation reads as follows:

> 29 C.F.R. § 1910.1029(g)(3): The employer did not institute a respiratory protection program in accordance with 1910.134 of this part, in that; Respiratory Training did not provide the employees an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> (a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.[3]

[3] Part (b) of the original citation also alleged that CF&I had violated 29 C.F.R. § 1910.1029(g)(3) because:

> (b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit.

App. 76a. However, as Petitioner has conceded in Footnote 10 of its brief, this portion of the citation was not upheld by the Administrative Law Judge, and the Secretary has not challenged that ruling in this proceeding. Petitioner's brief at p.11.

App. 76a. The Secretary believed that the alleged violation was willful[4], and proposed a fine of $10,000.[5]

CF&I filed a notice of contest pursuant to 29 U.S.C. § 659(c), contending that it had not violated § 1910.1029(g)(3). The Secretary notified the Commission of CF&I's intent to contest the citation (See 29 U.S.C. § 659(c)), and the matter was set for hearing before an Administrative Law Judge ("ALJ") of the Commission. See 29 U.S.C. § 661(i).

The ALJ conducted a hearing and upheld only that portion of the citation pertaining to the allegation that 28 employees had failed their respirator fit test and were not provided with respirators which would fit.[6] App. 57a-61a. In the ALJ's opinion, CF&I violated 1029(g)(3) because it had not complied with 29 C.F.R. § 1910.134(e)(5), a regulatory standard incorporated by reference in 1029(g)(3) and governing the training and instruction for the selection, use and maintenance of respirators.

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[4] Under the provisions of the Act, violations may be classified as either willful or repeated, serious or not serious. 29 U.S.C. § 666(a)-(c).

[5] Pursuant to 29 U.S.C. § 666(i), only the Commission has authority to assess civil penalties, however, fines are proposed by the Secretary in the first instance. See 29 U.S.C. § 659.

[6] It is undisputed that these 28 employees were provided with a qualitative fit test, known as the "banana oil" test (App. 78a), and therefore, there is no issue regarding the interpretation of "test atmosphere" or "atmospheric testing," since those issues arose in reference to part (b) of the citation, which is not before this Court. Accordingly, the arguments advanced by the AFL-CIO as *amicus curiae* in this proceeding regarding "atmospheric testing" are irrelevant.

On review, the Commission reversed the decision of the ALJ and vacated the citation. The Commission rejected the Secretary's argument that 134(e)(5) required an employer to assure that a respirator is fitted properly. App. 40a. The Commission's reasoning in rejecting the Secretary's argument was two-fold: (1) the plain language of 134(e)(5) indicates that it is a training standard designed to instruct and train employees on such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal, and therefore, since CF&I had provided its employees with adequate training and instruction[7], the Secretary failed to prove a violation of 1029(g)(3) (App. 41a); and (2) accepting the Secretary's "interpretation" of 134(e)(5) would eliminate the purpose and meaning of 29 C.F.R. § 1910.1029(g)(4)(i), which specifically covers an employer's duty to assure proper fit of a respirator.

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[7] In support of its conclusion that the training and instruction was adequate, the Commission specifically cited the findings and testimony of compliance officer, Gerald Ryan, who conducted the inspection of CF&I on behalf of the Secretary:

> Compliance officer Ryan testified that before they were assigned to the regulated areas, CF&I employees were given a respirator, told when to use it, and shown how to perform a positive-negative pressure test. [Footnote omitted] They were also shown a film illustrating the various types of respirators, their use and proper function, use of a banana oil (isoamyl acetate) atmosphere for fitting, and how to place and fasten a respirator properly, including tightening for good fit. Ryan testified that CF&I also gave the employees a banana oil test. (App. 37a-38a.)

The Commission further noted that rather than attempt to amend the citation to reflect a violation of 1029(g)(4)(i),[8] the Secretary, instead, chose to maintain its "interpretation" of 1029(g)(3). App. 44a. As a result of the Secretary's position, the Commission was faced with the sole question of "whether the Secretary had proven a violation of section [1029(g)(3)]." *Id.* In addressing this specific issue, the Commission concluded that CF&I provided proper training and instruction to its employees, and therefore, the Secretary had failed to establish a violation of 1029(g)(3).[9] App. 45a.

On appeal, the Tenth Circuit Court of Appeals affirmed the decision of the Commission. The court first addressed the discrepancy in the interpretation of the regulatory provisions between the Secretary and the

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[8] In footnote 8 of its brief, Petitioner correctly notes that the original citation was amended by the Secretary to reflect a violation of 1029(g)(3), instead of (b)(3). However, the Secretary at no time attempted to amend the citation to allege a violation of 1029(g)(4)(i), instead of 1029(g)(3). The Secretary instead has chosen to "interpret" 1029(g)(3), rather than issue a citation under 1029(g)(4)(i). Therefore, the issue is not whether CF&I's conduct was proscribed by regulation, but rather, the issue is whether the Secretary may "interpret" a regulatory standard in such a manner so as to prohibit conduct which is specifically addressed by a different regulatory standard.

[9] In reaching its conclusion, the Commission found that employees of CF&I were given the opportunity to handle a respirator under various conditions and to wear the respirator in a test atmosphere under the guidance of an industrial hygienist. App. 45a. The Commission concluded that "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate." *Id.*

Commission, and noted the conflict between the circuit courts on the issue of whether deference should be accorded to the Commission's interpretation or the Secretary's. App. 4a. The court then consulted the language of the Act and the legislative history behind the creation of the Commission, and determined that deference to the Commission's interpretation was appropriate in those circumstances when the Secretary has promulgated an ambiguous regulatory standard and the Commission has interpreted the standard in a manner well within the plain meaning of the regulation. The court said:

> [W]here the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission. [citation omitted] If the Secretary believes that the Commission has interpreted a regulation in a manner inconsistent with OSHA's goals, it may be necessary to amend or clarify that regulation.

App. 7a. In reaching its decision, the court was careful, however, to note the unique roles of the Commission and Secretary under the Act and that another result may prevail under a different statutory framework:

> Although we hold that, under OSHA, deference is properly accorded to the regulatory interpretations of the Commission, we recognize that another result may prevail under a different statutory framework. We further stress that our holding not be construed as a carte blanche for the Commission to overturn settled regulatory interpretations of the Secretary. The Secretary's unique policy and rulemaking role requires that

> her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. Because we find the regulations in the instant case to be ambiguous, we defer to the interpretation enunciated by the Commission, insofar as it is reasonable.

App. 9a.

The court examined the language of the regulatory standards at issue and scrutinized the Commission's interpretation of those standards. In concluding that the Commission's interpretation of the standards was reasonable, the court noted that "[w]hile it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language contained in 29 C.F.R. § 1910.1029, we defer to the interpretation chosen by the Commission."[10] App. 11a.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals correctly affirmed the Order of the Commission vacating the citation issued by the Secretary to CF&I. The Commission's

[10] Because the court of appeals opined that deference was owed to the reasonable interpretation of the Commission, the Secretary's interpretation of the regulatory standards at issue was never subjected to judicial scrutiny. Thus, contrary to the arguments of AFL-CIO as *amicus curiae*, there has never been a decision that the Secretary's interpretation of the regulatory standards was reasonable. As argued in this brief, *infra* pp. 23-29, the Secretary's interpretation of the regulatory standards is contrary to the plain language of the regulations and would not withstand judicial scrutiny.

order was based upon a reasonable interpretation of the regulatory standards at issue and was consistent with the plain language of the standard; whereas, if accepted, the Secretary's interpretation would have violated well established rules of construction. Therefore, deference to the Commission's reasonable interpretation of the regulatory standards was proper under the facts and circumstances of the present case.

1. In those instances under the Act when the Secretary's interpretation of a regulatory standard is clearly wrong or when the regulatory standard is genuinely ambiguous, the Court of Appeals properly held that deference should be accorded to the Commission's reasonable interpretation. As the adjudicator of contested citations, the Commission's function is to affirm, modify or vacate the Secretary's citation, or direct other appropriate relief. This function necessarily includes the power to declare the law by interpreting regulations and is necessary and important to preserve the notice and due process rights of employers. The Commission was created specifically in response to business concerns that the Secretary would be a biased adjudicator of regulatory standards.

Moreover, the Commission's ability to interpret regulations is consistent with the congressional intent of the Act and does not infringe upon the Secretary's rulemaking and policymaking functions under the Act. The Commission is composed of persons who possess special training, education and expertise necessary to interpret regulatory standards and apply them to a given factual setting. This special training, education and expertise makes the Commission uniquely qualified to interpret

regulatory standards and apply them to a given factual setting. Furthermore, the Commission's ability to interpret and apply regulations is consistent with the Secretary's role as rulemaker and ensures that she will promulgate unambiguous regulatory standards, which she is obligated to do under the Act, or utilize the proper rulemaking process to amend or clarify ambiguous regulatory standards.

2. Deference to the Commission's reasonable interpretation of the regulatory provisions was particularly appropriate under the facts and circumstances of the present case. Any deference which is owed to an agency's interpretation of a regulatory standard is only owed to the *reasonable* interpretation of the agency. Since the facts and circumstances of this case demonstrate that the Secretary's interpretation of the regulatory standards was unreasonable and inconsistent with the plain language of the standards, the Tenth Circuit properly deferred to the reasonable construction given the standards by the Commission.

Additionally, deference is normally accorded to an agency because of expertise and because of authorship. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332 n.10 (6th Cir. 1978). The Commission members are required to have the necessary expertise and training to interpret regulations. Since the Secretary did not promulgate 134(e)(5), but merely adopted the standard from a national consensus standard promulgated by the American National Standards Institute, no deference was owed to the Secretary's unreasonable interpretation of the regulatory standard.

3. In no event should this Court establish a uniform rule of deference to the Secretary's interpretation of a regulatory standard under all circumstances. In order to preserve the integrity and function of the Commission, a reviewing court should be allowed to scrutinize both the Secretary's interpretation and the Commission's interpretation of a regulatory standard, and deference should be afforded to the most reasonable interpretation of the regulatory standards at issue, giving due consideration to the notice rights of the employer and to the interpretations of both the Commission and the Secretary, as well as the purpose and plain language of the regulatory standards at issue. This approach would preserve the respective roles of the Commission and the Secretary, and at the same time maintain the integrity and function of the Commission as an autonomous, independent and quasi-judicial body.

ARGUMENT

I. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY HELD THAT DEFERENCE IS OWED TO THE COMMISSION'S REASONABLE INTERPRETATION OF AN AMBIGUOUS REGULATORY STANDARD.

In holding that it would defer to the Commission's reasonable interpretation of the regulatory standards at issue, the court of appeals identified two situations when deference to the Commission's reasonable interpretation would be particularly appropriate: (1) when the Secretary's interpretation was clearly wrong, and (2) when the Secretary has failed to convey the meaning of a regulation

by promulgating a genuinely ambiguous regulatory standard. The court directed, however, the Commission to accord substantial weight to the regulatory interpretations of the Secretary. The holding by the court of appeals properly recognized the respective roles and functions of the Commission and the Secretary and was a proper ruling under the facts and circumstances of the present case.

A. As adjudicator, the function of the Commission is to interpret regulations, including ambiguous regulatory standards.

Under the enforcement procedures of the Act, the Secretary is charged with the prosecutorial responsibilities of issuing citations[11] and proposing penalties when she believes that an employer has violated a regulatory standard. See 29 U.S.C. § 659(a). If the employer contests the citation[12], the Secretary must notify the Commission, and the Commission must thereafter afford the employer an opportunity for a hearing in accordance with Section 554 of Title 5.[13] See 29 U.S.C. § 659(c). This

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[11] This responsibility includes the obligation to specify the exact standard which the employer is alleged to have violated. See 29 U.S.C. § 658(a).

[12] If an employer does not contest the citation or fails to notify the Secretary within fifteen (15) days of the intent to contest the citation, the citation and the assessed penalty become the final order of the *Commission*, not the Secretary. 29 U.S.C. § 659(a). Moreover, the Commission is the final authority of all enforcement actions brought by the Secretary. *Id.*

[13] 5 U.S.C. § 554 (1966) is entitled "adjudications", and recognizes the need for resolution of issues of both fact and law. See 5 U.S.C. § 554(b)(3).

adjudicatory hearing must be held in accordance with the Administrative Procedure Act, and must advise the employer of the matters of fact and law asserted.[14] See 5 U.S.C. § 554(b)(3). Thus, the provisions of the Act contemplate that the Commission will act as an adjudicator over matters of fact and law asserted at the hearing. See 29 U.S.C. § 659.

After it conducts the adjudicatory hearing, the Commission has the responsibility to issue an order based on findings of fact. 29 U.S.C. § 659(c). This order may affirm, modify or vacate the Secretary's citation or proposed penalty, or direct other appropriate relief. *Id.* The Commission's authority to modify a particular citation or to direct other appropriate relief necessarily encompasses the ability of the Commission to interpret regulations and apply them to a given factual setting. As the Tenth Circuit Court of Appeals concluded, this ability is within the normal complement of adjudicative powers possessed by traditional administrative agencies (App. 7a), and has been delegated by Congress to the Commission in accordance with 5 U.S.C. § 554 and the provisions of the Act. See also *Chevron, U.S.A., Inc.*, 467 U.S. at 845; *Accord*

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[14] Contrary to the assertions of Petitioner and *amicus curiae* AFL-CIO, nothing in the provisions of the Act limit the adjudicatory authority of the Commission under 5 U.S.C. § 554. The absence of such a limitation supports the conclusion that the Commission has been afforded the full spectrum of adjudicatory powers normally given to an administrative agency, including the ability to interpret ambiguous regulations. See *Department of Treasury, I.R.S. v. FLRA*, 110 S.Ct. 1623, 1629 (1990); *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699-700 (1984); *United States v. Shimer*, 367 U.S. 374, 383 (1961).

Moreover, the adjudicatory power of the Commission to interpret regulations and modify citations is complimented by the composition of the Commission. Pursuant to § 661(a) of the Act, the Commission is composed of three (3) members appointed by the President, by and with the advice and consent of the Senate. These members are appointed from among persons who by reason of training, education or experience are "qualified to carry out the functions of the Commission[.]" *Id*. This expertise makes the members of the Commission uniquely qualified to exercise the normal complement of adjudicatory powers possessed by traditional administrative agencies, including the ability to interpret and apply regulatory provisions.

In authorizing the Commission to carry out its functions, the Act empowers the chairman of the Commission to appoint ALJs as he deems necessary to assist in the performance of the Commission's functions. 29 U.S.C. § 661(e). These ALJs are appointed to "hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith." 29 U.S.C. § 661(j). The decision of the ALJ becomes the final order of the Commission, unless the Commission members determine that the ALJ's decision should be reviewed by the Commission.[15] Nothing in this elaborate and detailed statutory scheme limits the adjudicative

[15] Pursuant to § 661(f), two members of the Commission are necessary to constitute a quorum, and official action can be taken only on the affirmative vote of at least two members.

powers of the Commission. Indeed, the unique composition of the Commission and the statutory grant of full adjudicative powers confirms that the Commission, as adjudicator, has been given the authority and responsibility to interpret regulations.

As the adjudicator of contested citations with the power and responsibility to affirm, modify, vacate or direct other appropriate relief, the Commission is necessarily responsible to interpret the meaning and effect of a particular regulatory standard as applied to a given factual setting. Without such ability, the purpose and function of the adjudicator is frustrated, especially given the elaborate statutory scheme and composition of the Commission under the Act. Accordingly, when a particular segment of an agency has been created as an adjudicator with the function, authority and expertise to interpret and apply regulations, any deference to an interpretation of an ambiguous regulation should be given to that segment of the agency designed and created for that particular purpose.

B. Affording deference to the Commission's reasonable interpretation of an ambiguous regulatory standard is consistent with the congressional intent of the Act.

As explained by the court of appeals, when the Act was first proposed it vested adjudicatory power with the Secretary. See S. 2193, 91st Cong., 1st Sess. § 6 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 11-13 (1971) ("*Legislative History*"). The proposal was met with strong concern and

opposition by business and industry. The opponents argued that combining prosecutorial and adjudicative authority in the Secretary would produce biased results against employers. See *Legislative History* at 463-64. In response to business and industry concerns and opposition, Congress withdrew the adjudicative authority from the Secretary, and created the Commission as an autonomous and independent, quasi-judicial body. *Id.* at 462, 465. While rulemaking remained with the Secretary, the Commission was created as the neutral decision maker, where industry and business could obtain fair and unbiased adjudications and applications of regulatory standards to particular factual circumstances.

The congressional intent of the Act has been furthered by the Tenth Circuit Court of Appeals' approach in the present case. As the court of appeals held, "[t]he Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity." App. 9a. The directive by the court of appeals carefully balances the respective roles of the Secretary and the Commission by obligating the Commission to respect the interpretations of the Secretary, but at the same time, allowing the Commission to exercise its independent adjudicative powers in those circumstances when the Secretary's interpretation is clearly wrong or when the Secretary has failed to convey the meaning of a regulatory provision by promulgating a genuinely ambiguous standard. This approach is a balanced and well-reasoned one which compliments the unique roles of both the Secretary

and the Commission, and furthers the purpose and function of the Commission and the congressional intent of the Act.

C. The Commission's ability to interpret regulations, including ambiguous regulatory standards, is not inconsistent with the Secretary's role of promulgating standards.

Under the provisions of the Act, the Secretary is charged with the responsibility to promulgate rules and regulations. See 29 U.S.C § 655. This responsibility is accomplished through the standard rulemaking procedures designed to afford interested persons with notice of the proposed regulation and its meaning and the opportunity to participate in the agency regulatory process. See 29 U.S.C. § 655(b); 5 U.S.C. § 553(e). It is the Secretary's responsibility and function to promulgate clear and unambiguous standards. *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3rd Cir. 1978). By allowing the Commission to exercise its legitimate adjudicatory power to interpret and apply regulations promulgated by the Secretary, the Secretary is forced to promulgate clear and unambiguous standards which can guide an employer in providing a safe and healthful environment for its workers.

Not only does the Commission's ability to interpret regulations require the Secretary to promulgate clear and unambiguous standards, but it also furthers the purpose for which the Commission was created. As stated earlier, the Commission was designed to alleviate business concerns that the Secretary would not be an unbiased adjudicator of citations and interpreter of regulations. By

design, the Commission was created, therefore, in order to provide industry with a neutral decision maker that would be sensitive to employer's concerns regarding ambiguous regulatory standards. In other words, the Commission was created for the purpose of providing employers with a neutral, independent and autonomous body which would interpret and apply regulations fairly, based upon the facts and circumstances of a given situation.

This role by the Commission in adjudicating and interpreting regulations, especially ambiguous ones, does not infringe upon the role of the Secretary as rulemaker under the Act. As the Tenth Circuit's opinion indicates, settled regulatory interpretations of the Secretary are to be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. App. 9a. Thus, in those instances when the Secretary has promulgated a clear and unambiguous regulatory standard, which she is obligated and entrusted to do, her interpretations are accorded appropriate weight necessary to administer and implement statutory policy. However, when the Secretary's interpretation is clearly wrong or when she has failed to promulgate a clear and unambiguous regulatory standard, it is the role of the Commission to act as a neutral and fair interpreter of the regulation, so as to assure employers that they are not subjected to biased and unfair treatment. Hence, the creation of the Commission as the adjudicator and interpreter of ambiguous regulations promulgated by the Secretary is not only consistent with the congressional intent of the Act, but serves as a fair and equitable compliment to the Secretary's role as

rulemaker, and assures that the Secretary will promulgate clear and unambiguous standards necessary to guide the actions of employers.

II. THE JUDGMENT OF THE TENTH CIRCUIT PROPERLY AFFIRMED THE REASONABLE INTERPRETATION OF THE COMMISSION, ESPECIALLY GIVEN THAT THE SECRETARY'S INTERPRETATION OF THE REGULATORY STANDARDS WAS UNREASONABLE.

The actual issue presented by the merits of this case is not as broad as merely whether deference is owed to the Commission over the Secretary under the Act. Although the court of appeals opined that deference is properly owed to the Commission's reasonable interpretations under the Act, "[t]his Court reviews judgments, not opinions." *Chevron U.S.A. Inc.*, 467 U.S. at 842.[17] More importantly, the issues before this Court cannot be viewed without regard to the facts and circumstances of the case, as well as the regulatory standards at issue and the unreasonable interpretation proposed by the Secretary.[18] Contrary to Petitioner's implications, this

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[17] See also *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (court's duty is to look beyond opinions to determine precise grounds of judgment); *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 59 (1940).

[18] Petitioner's entire brief relies heavily upon the argument that deference should be accorded to the Secretary over the Commission, without any justification or defense of the interpretation reached by the Secretary of the regulatory standards at issue. Thus, Petitioner contends that a reviewing court

(Continued on following page)

case does not present a situation where the Secretary and the Commission have both reached reasonable interpretations of the same regulatory standard; but rather, the question presented by the facts of this case is whether a reviewing court should defer to the Commission's reasonable interpretation of a regulatory standard as opposed to the unreasonable interpretation of the Secretary.

A. Based upon the plain language of the regulatory standards, the Commission reasonably concluded that CF&I had not violated the standards cited by the Secretary.

It is a well established rule of law that an administrative regulation must be construed in accordance with the plain language of the regulation. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1979). When an administrative agency has failed to convey the meaning of a regulation which may impose civil or criminal penalties, the regulation must be enforced according to the actual wording used, and not by the wording the agency wished it had used. *Diamond Roofing Co., Inc.*, 528 F.2d at 649. If the regulation misses the mark, fault lies with the author of the regulation and the chosen wording – "a matter easily remedied under the flexible regulation promulgating structure" of the Act. *Id.*

(Continued from previous page)

should always defer to the interpretation of the Secretary, regardless of whether that interpretation is reasonable. Such a rule of deference is not warranted by the facts of this case and ignores the adjudicatory function of the Commission.

In the present case, the Commission exercised its legitimate adjudicatory functions necessary to determine whether the Secretary had proven a violation of the cited regulatory standards when it interpreted the standards in accordance with their plain language. In addressing the Secretary's contention that CF&I had violated 134(e)(5), the Commission relied upon the plain language of 134(e)(5) and concluded that the first and second sentences of the standard required only that users of respirators be instructed properly in the selection, use, and maintenance. The first two sentences of the standard read:

> (5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons.

App. 40a. The Commission then scrutinized the remainder of 134(e)(5) and concluded that the standard required an employer to instruct employees only during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit of a respirator and how to obtain a face-piece seal. The remainder of the standard reads:

> Training shall provide the men [sic] an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

App. 41a. The Commission further concluded that the standard required an employer to provide hands-on-experience with respirators and an opportunity to wear

the respirator during training. App. 41a. Nothing, however, within the plain language of the cited standard required an employer to assure proper fit of the respirator or specify how proper fit was to be accomplished. Therefore, because all 28 coke oven employees had been provided with adequate training and instruction in accordance with 134(e)(5), the Commission reasonably concluded that the Secretary had failed to prove a violation of the cited standard.

The Commission's conclusion that 134(e)(5) was a training standard was reasonable. First, the language of the standard clearly states that the user of a respirator is to be properly *instructed* in the selection, use and maintenance of the respirator. Second, the standard also states that *training* of employees shall provide *an opportunity* to use and test the respirator. However, nothing in the standard requires an employer to assure proper fit of a respirator, nor does the standard specify the testing methods necessary to accomplish such fit. Rather, as the Commission correctly concluded, assuring proper fit of a respirator is covered by 1029(g)(4)(i). Thus, the Commission's interpretation was reasonable and comports with the plain meaning and language of 134(e)(5).[19]

As further support for its interpretation that 134(e)(5) did not require an employer to assure proper fit of a respirator, the Commission recognized the principle of

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[19] In upholding the Commission's decision to vacate the citation, the Tenth Circuit noted that the plain wording of the incorporated 134(e)(5) covered "training", and that nothing in the standard required an employer to insure proper fit of each employee's respirator. App. 10a-11a.

construction that "a statute or regulation must be read as a whole and that all parts of the statute, if at all possible, are to be given effect." App. 41a.[20] Guided by this principle, the Commission scrutinized the language of 1029(g)(4)(i) and concluded that this regulatory standard not cited by the Secretary was designed specifically to cover an employer's duty to assure proper respirator fit:

> (4) *Respirator usage.* (i) The employer shall assure . . . that the respirator is fitted properly.

App. 122a. By scrutinizing the plain language of both 134(e)(5) and 1029(g)(4)(i), and by attempting to construe the regulation as a whole and give meaning to all parts and standards, the Commission correctly and reasonably concluded that 134(e)(5) could not be interpreted reasonably to require an employer to assure proper fit of a respirator, since 1029(g)(4)(i) was specifically designed to cover such a safety requirement.

B. The Secretary's purported interpretation of 1029(g)(3) and 134(e)(5) is an impermissible construction of the regulatory provisions and, therefore, is not entitled to any deference.

An administrative agency's interpretation of a regulation is entitled to deference only if the construction is

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[20] See *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 163 (1982); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633-634 (1973); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

reasonable and not inconsistent with the plain language of the regulatory provisions. *Chevron U.S.A. Inc.*, 467 U.S. at 843-845. A regulation must be construed according to the plain language of the standard, and not in a manner that deprives employers of fair notice of the standard's requirements. See *Usery v. Kennecott Cooper Corp.*, 577 F.2d 1113, 1119 (10th Cir. 1977); *Diamond Roofing Co., Inc.*, 528 F.2d at 650.

In the present case, the Secretary issued CF&I a citation for violation of 1029(g)(3) on the basis that 28 coke oven employees allegedly had failed a qualitative fit test[21] and were not provided with a different respirator. When first issued, the citation erroneously cited CF&I for a violation of § 1910.1029(*b*)(3). The Secretary subsequently amended the citation to indicate a violation of 1029(g)(3), despite the fact that 1029(g)(4)(i) specifically covered the alleged conduct cited by the Secretary. Rather than cite the directly applicable regulatory standard or amend the citation accordingly, the Secretary has chosen instead to "interpret" 1029(g)(3) to its liking and indirectly prohibit the conduct directly proscribed by

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[21] As mentioned previously in footnote 6 of this brief, there is no controversy that each of the 28 employees were given a qualitative fit test in a "test atmosphere", and that the employees received instruction and training on the proper care and use of the respirators. Therefore, contrary to the statement of the AFL-CIO as *amicus curiae*, this case does not involve a question of whether "atmospheric testing" is required by the regulatory standards at issue, nor does this case involve any issue regarding the interpretation of "test atmosphere" under 134(e)(5). Rather, the sole interpretation at issue concerns the Secretary's position that 134(e)(5) requires an employer to assure proper fit of a respirator.

1029(g)(4)(i). Not only is such an approach by the Secretary unreasonable,[22] but as the Commission concluded, the Secretary's interpretation of 1029(g)(3) ignores the plain language of the regulatory standard and renders 1029(g)(4)(i) superfluous and without meaning.

Section 1029(g)(3) provides: "(3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part." Nothing in the plain language of 1029(g)(3) indicates that an employer is required to assure proper fit of a respirator. Rather, the Secretary relies exclusively upon the incorporation of 134(e)(5)[23] as the basis for construing

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[22] If the Secretary's position that she may merely "interpret" a separate regulatory provision rather than cite the directly applicable standard is accepted, the rulemaking procedures of the Act would be easily circumvented and employers would be deprived of their rights to fair notice and comment. For example, as in the present case, the Secretary could merely adopt a national consensus standard pursuant to Section 6(a) of the Act, and subsequently "interpret" the standard through adjudication in a manner which is inconsistent with the intent of the drafter. This type of rulemaking by adjudication is unfair and deprives employers of the notice and comment opportunity of the Act. *United Steel Workers of America v. Schuylkill Metals*, 828 F.2d 314, 324 (5th Cir. 1987) (Jones, J., dissenting); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

[23] It is important to note that 134(e)(5) was a pre-existing industry standard which was adopted under Section 6(a) of the Act, without regard to the notice and comment rulemaking provisions of Section 6(b) and the Administrative Procedure Act, 5 U.S.C. § 553. App. 43a, n.12. Thus, any deference normally owed to an agency's interpretation of "its own"

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1029(g)(3) as requiring proper fit of a respirator. The Secretary contends that reference to § 1910.134 was intended to include 134(e)(5), despite the fact that 1910.134(b) is entitled *"Requirements for a minimal acceptable program."* App. 111a.

As the Commission correctly concluded, 134(e)(5) cannot be construed reasonably as requiring an employer to assure a proper respirator fit. Rather, 134(e)(5) requires employers to instruct employees on such matters as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal. App. 41a. The employees must also receive hands-on experience with the respirators during training. *Id.* This training includes providing each employee with "an opportunity" to wear the respirator in a test atmosphere during training. However, 134(e)(5) does not, as the Secretary argues, require that the employer assure proper fit of the respirator or specify how this is to be done; that safety requirement is covered by 1029(g)(4)(i). *Id.*

In an effort to circumvent the obvious language of the regulatory standard, the Secretary argues that the one reference to "have it fitted properly" contained in

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regulation is reduced, since the Secretary has not promulgated the standard at issue. See *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 160 (3rd Cir. 1978). More importantly, by merely adopting the pre-existing standard without the rulemaking procedures of the Act, the Secretary may not construe a regulatory standard to impose requirements which the standards source did not impose. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332 (6th Cir. 1978).

134(e)(5) obligates an employer to assure proper fit of a respirator. This attempted construction, however, ignores the numerous references to "instruction and training" which precede the relied upon phrase and further ignores the fact that, as the ALJ and Commission found, each of the 28 employees were provided "an opportunity" to have their respirators fitted by exposure to isoamyl acetate ("banana oil"). See App. 52a. The plain language of the standard cannot be "interpreted" reasonably to require an employer to assure proper fit, and any attempt by the Secretary to do so is unreasonable.

Moreover, the Secretary is at a complete loss to explain the obvious inconsistency between her interpretation of 134(e)(5) and the plain meaning and language of 1029(g)(4)(i).[24] The Secretary's only attempt to explain this discrepancy is contained in footnote 37 of Petitioner's brief wherein she contends that "in support of the reasonableness of the Secretary's interpretation . . . [n]othing prevents overlapping prohibitions in statutes or regulations." While it is true that "some" overlapping prohibitions may be permissible, the Secretary's "interpretation" of 134(e)(5) would completely encompass the conduct proscribed by 1029(g)(4)(i), thereby rendering the language of 1029(g)(4)(i) superfluous. When the regulatory standards are construed as a whole, it is clear that 1029(g)(3) and 134(e)(5) were

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[24] During testimony, compliance officer Gerald Ryan acknowledged that 1029(g)(4)(i) was directly applicable to the cited condition and that he may have cited the wrong standard. App. 43a. The Secretary, however, did not move to amend, but instead, chose to "interpret" 1029(g)(3) to its benefit. App. 44a.

intended to assure proper training and instruction to employees regarding the selection, use and maintenance of respirators and that 1029(g)(4)(i) was designed to insure the proper fit of respirators. Any other "interpretation" by the Secretary would violate well established rules of construction and be an impermissible "interpretation" of the regulatory standards at issue. See *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

Additionally, the Secretary is attempting to rulemake after the fact through adjudication. Section 134(e)(5) was not promulgated by the Secretary, but rather, it was a pre-existing standard which was adopted by the Secretary as a national consensus standard pursuant to Section 6(a) of the Act, without regard to the comment and notice rulemaking procedures under Section 6(b) of the Act or the Administrative Procedure Act, 5 U.S.C. § 553. By allowing the Secretary to adopt a national consensus standard through Section 6(b) of the Act, without normal rulemaking procedures, and subsequently allowing the Secretary to "interpret" the provision to its liking, the Secretary would be permitted to rulemake by adjudication, thereby circumventing the notice requirements and purpose of the rulemaking function.

In footnote 23 of its brief, Petitioner concedes that 134(e)(5) was adopted rather than promulgated by the Secretary; however, Petitioner argues that the selection of a pre-existing standard is itself a policymaking exercise entitling the Secretary's interpretation to deference. This argument by Petitioner confuses the concepts of adoption versus interpretation. While the Secretary's decision to adopt a pre-existing standard which was authored by a

different entity can be viewed as an exercise of its policymaking authority, such a decision does not entitle the Secretary's interpretation of that standard to deference. Indeed, because the Secretary has chosen to adopt pre-existing language rather than promulgate "its own" regulatory standard pursuant to the notice and comment rulemaking procedures of the Act, the Secretary's interpretation of the standard is not entitled to special deference, especially when her interpretation attempts to impose additional requirements not intended by the drafters of the standard and not consistent with the plain language of the regulation. See *Marshall*, 596 F.2d at 374; *Bethlehem Steel Corp.*, 573 F.2d at 160; *Diebold, Inc.*, 585 F.2d at 1332.

Consequently, this case does not present an issue of whether deference is properly owed under the Act to the interpretations of either the Secretary or the Commission; but rather, the issue is whether the Tenth Circuit's judgment properly deferred to the Commission's reasonable interpretation of the regulatory standards at issue, as opposed to the unreasonable interpretation of the Secretary. Because this case presents a question of deference to a reasonable interpretation of the Commission versus an unreasonable interpretation by the Secretary, the judgment of the court of appeals correctly affirmed the Commission's reasonable interpretation of the regulatory standard.

III. A JUDICIALLY CREATED RULE OF DEFERENCE TO THE SECRETARY UNDER ALL CIRCUMSTANCES WOULD UNDERMINE THE PURPOSE AND FUNCTION OF THE COMMISSION AND SHOULD NOT BE ADOPTED BY THIS COURT.

Any rule of deference to the Secretary's interpretation of a regulatory standard over the reasonable

interpretation of the Commission would undermine the purpose for which the Commission was created. Indeed, such a rule of deference would make the Commission a subordinate body with no function other than to make findings of fact and rubberstamp the Secretary's views, a result clearly at odds with the congressional intent of an independent body designed to alleviate business concerns.

Furthermore, any rule of deference to the Secretary's interpretation over the reasonable interpretation of the Commission would allow the Secretary to rulemake by adjudication and encourage the promulgation of genuinely ambiguous regulatory standards. One purpose of rulemaking is to provide affected persons with notice of prohibitive conduct and an opportunity to be heard regarding the promulgation of specific standards. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470-471 (D.C. Cir. 1980); *National Petroleum Refiners Association v. F.T.C.*, 482 F.2d 672, 683 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). By creating a judicial rule of deference to the Secretary's interpretation, even when the Commission has reached a reasonable interpretation of an ambiguous regulatory standard, deprives employers of a neutral adjudicator and interpreter, and encourages the Secretary to promulgate ambiguous regulatory standards. Such a rule would eliminate the purpose of amending and clarifying regulations.[25]

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[25] As the court of appeals noted, if the Secretary maintains that a different result should prevail under OSHA, she should

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Thus, even if this Court determines that a reviewing court should not defer to the Commission's reasonable interpretation of an ambiguous regulatory standard, there should be no judicial rule of deference to the Secretary's interpretation under the Act. Consistent with the Third Circuit's approach in *Bethlehem Steel Corp.*,[26] when the Commission and Secretary have reached conflicting interpretations regarding a regulatory standard, the Court should rely upon the plain wording of the standard. 573 F.2d at 160. "If the language is faulty, the Secretary has the means and obligation to amend." *Id.* 573 F.2d at 161.[27] "To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the Occupational Safety and Health Regulations will be written in clear and concise language so that employers will be better able to understand and observe them." *Diamond Roofing Co., Inc.*, 528 F.2d at 650. The responsibility to promulgate clear and unambiguous standards is upon the Secretary. *Bethlehem Steel Corp.*, 573 F.2d at 161.

If this Court is compelled to issue a uniform guidance to the various circuit courts regarding the standard

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amend or clarify the regulations through the rulemaking process. App. 11a. The Secretary's argument that the amending process is time-consuming and burdensome is without merit, given that the process is there to serve a purpose, and that purpose should not be circumvented by meritless arguments of inconvenience.

[26] 573 F.2d 157 (3rd Cir. 1978).

[27] See also *Irvington Moore, Division of U.S. Natural Resources, Inc. v. OSHRC*, 556 F.2d 431, 436 (9th Cir. 1977).

of review to be exercised when the Secretary and Commission have reached contrary interpretations of an ambiguous regulatory standard, a rule of deference to the Commission's reasonable interpretation would be consistent with the purposes of the Act. In no event, however, should there be a rule of deference to the Secretary's interpretation under all circumstances, since such a rule would undermine the purpose and function of the Commission, especially when, as in the present case, the Secretary's interpretation is unreasonable at a minimun, in those instances when the Secretary has promulgated a genuinely ambiguous regulatory standard and the Commission has reached a reasonable interpretation which is contrary to the Secretary's interpretation, a reviewing court should be free to scrutinize both interpretations and arrive at the most reasonable interpretation of the standard which is consistent with the notions of due process to employers and the language and intent of the regulation. Such an approach would maintain the separate but distinct roles of the Secretary and the Commission, and at the same time, maintain the integrity and purpose of each arm of the Agency.

CONCLUSION

Based upon the foregoing arguments, CF&I respectfully requests that the judgment of the Tenth Circuit be affirmed. In the alternative, CF&I respectfully requests that the matter be remanded to the Tenth Circuit for consideration of those arguments and challenges made by CF&I which were not addressed by the court of

appeals because of the disposition of the case on the merits.

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No. 89-1541

In the Supreme Court of the United States

OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
AND
CF&I STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
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v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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CF&I STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our opening brief, we showed that, under the regime created by the Occupational Safety and Health Act (OSH Act), the Secretary of Labor, rather than the Occupational Safety and Health Review Commission, is entitled to deference in the interpretation of the Secretary's regulations. As we discussed (at 18-27), deference is rooted in respect for the congressional delegation of policymaking authority; the OSH Act assigns policymaking and enforcement responsibilities to the Secretary, and establishes the Commission as a "neutral arbiter." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 7 (1985). The appropriate question for a reviewing court should thus be the reasonableness of the Secretary's interpretation of her regulation. Because the court of appeals erroneously de-

ferred to the Commission and did not determine the reasonableness of the Secretary's interpretation of her regulation, we believe the judgment should be reversed and the case may appropriately be remanded to the court of appeals for that determination.

In response to our argument, respondent and its amici, including the Commission, offer a range of objections and maintain that deference should properly be accorded to the interpretation of the Commission. We will consider the various objections in turn.

1. At the outset, it is important to address certain claims concerning our position and corresponding principles of administrative law.

a. Respondent fundamentally mischaracterizes our position as arguing that "a reviewing court should always defer to the interpretation of the Secretary, regardless of whether that interpretation is reasonable." Resp. Br. 19-20 n.18. In fact, our opening brief is quite explicit that the Secretary's interpretation should be upheld *if it is reasonable*, and that the reasonableness of the Secretary's interpretation is the appropriate question for a reviewing court.[1]

b. The Commission, for its part, also fails to present an accurate characterization of our position. The Commission repeatedly asserts that we would require the Secretary's interpretation to be given "controlling weight" (see, *e.g.*, Comm'n Amicus Br. 10, 18), but never places that term in the context in which it was used. We employed the phrase in quoting the settled principle of deference accorded an agency's interpretation of its own regulation: such an interpretation is " 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " Gov't Br. 20-21 n.17 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). This principle has been consistently reiterated by this Court.[2]

[1] See, *e.g.*, Gov't Br. 16 ("[A] necessary component of [the Secretary's] rulemaking authority is the ability to issue *reasonable* interpretations of those standards for the guidance of employers and employees.") (emphasis added); *id.* at 24 n.22 ("In this context, * * * the appropriate question for a reviewing court should be the *reasonableness* of the Secretary's interpretation.") (emphasis added). See also *id.* at 15, 20 n.17, 22, 27, 37 & n.37.

c. Rather than addressing the decisions concerning an agency's interpretation of its regulations, the Commission launches into a confused discussion of deference principles and administrative law. Amicus Br. 10-15. The Commission's central point seems to be that "*Chevron*-style deference" is appropriate principally for rules and orders, while a lesser form of deference, pursuant to *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), is appropriate for most other forms of administrative interpretations. Br. 13, 15.[3] But the sharp line the Commission seeks to draw between *Chevron* deference and *Skidmore* deference is untenable. In *Chevron* itself, the Court relied on *Skidmore* in determining the reasonableness of the agency's interpretation; *Skidmore* was thus an aspect of the Court's application of "*Chevron*-style" deference. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 865 & n.40 (1984). Other decisions have also relied on *Skidmore* in evaluating regulations. See, *e.g.*, *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980). Conversely, and contrary to the Commission's suggestion, *Chevron* has been applied to administrative

[2] See Br. 20-21 n.17 (citing *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989) and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)). See also *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 276 (1969).

[3] In *Skidmore*, this Court held that the "rulings, interpretations and opinions of the Administrator" of the Wage and Hour Division of the Department of Labor under the Fair Labor Standards Act, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

interpretations not embodied in regulations or orders.[4] Moreover, the Commission's analysis ignores the settled principle of deference to an agency's interpretation of its own regulation, whether or not embodied in a regulation or order. See, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *Thorpe* v. *Housing Auth.*, 393 U.S. at 276; *Bowles*, 325 U.S. at 416.

We believe that *Chevron* is not confined to one side of a rigid dichotomy but stands for a broad principle of deference to reasonable administrative interpretations; that this principle fairly embraces deference to an agency's interpretation of its regulations (see *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. at 1850); and that *Skidmore* may sometimes be helpful in assessing the reasonableness of such agency interpretations. To be sure, evaluation of the reasonableness of an agency interpretation—and the degree of deference to which it is entitled—may require consideration of the nature and form of that interpretation, but that fact lends no support to the Commission's theory.

Furthermore, even accepting the Commission's sharp dichotomy between *Chevron* deference and a lesser type of *Skidmore* deference, the Commission's corollary—that its adjudicatory interpretations *are* entitled to the higher *Chevron* deference—would not follow. *Chevron* explicitly

[4] See, *e.g.*, *Lukhard* v. *Reed*, 481 U.S. 368, 376 n.3, 378 (1987) (*Chevron* deference to Secretary's interpretation as reflected in Federal Register statement, letters, memoranda, and administrative practice); *id.* at 383-384 (Blackmun, J., concurring in judgment); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 227-228, 233, 240-241 (1986) (*Chevron* deference to Secretary's interpretation in executive agreement); *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 977-982 (1986) (*Chevron* deference to FDA interpretation, including notice in Federal Register reflecting that interpretation); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (*Chevron* deference to the FDIC's "practice and belief"; Court explicitly notes that "the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation"); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-715 (1985) (*Chevron* deference to "a statement accompanying the regulations").

rests on the congressional delegation of policymaking authority to the agency (467 U.S. at 843-845), and, as will be discussed in greater detail, the Commission has not been given policymaking authority under the Act. Indeed, the commentary relied on so extensively by the Commission (Amicus Br. 12-14) itself emphasizes that "[a] purely adjudicative agency, holding no rulemaking or other policymaking powers, 'is not entitled to any special deference from the courts' for its interpretations," and cites with approval a Fifth Circuit decision holding that deference should be accorded to the Secretary, rather than the Commission, in this very OSH Act context. See Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 47 & n.217 (1990).[5]

2. Respondent and the Commission propose an irrational, bifurcated approach to evaluating the Secretary's interpretation of her regulation. Because their positions differ in some significant respects, they will be addressed separately.

a. Embracing the court of appeals' opinion, respondent contends that "'[t]he Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity.'" Br. 16 (quoting Pet. App. 9a). We agree that the Secretary's interpretation may be rejected if her interpretation is "clearly wrong." But in advocating deference to the Commission whenever a regulation is determined to possess "genuine ambiguity," respondent precludes deference to the Secretary in the only situation in which it is pertinent.[6] As a result, respondent's state-

[5] Notably, neither the Commission, the respondent, nor any of the respondent's other amici addresses the fact that the Administrative Conference of the United States has analyzed the OSH Act context and has concluded that, in such "split-enforcement" administrative situations, the legislation should provide deference to the rulemaker, rather than the adjudicator. See Gov't Br. 36 n.36; 1 C.F.R. 305.86-4.

[6] See, *e.g.*, *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969) ("Granting that the regulation and its successor provision are not free from

ment that the Secretary's interpretation must be accorded "substantial weight" is so lacking in content as to be meaningless.

b. The Commission's position is different. It acknowledges that "the Commission should be, and is, hesitant to substitute its reading of a regulation for the reading of the Secretary"; thus, "the Commission will reject the Secretary's view only when," pursuant to *Skidmore* and to *Gardebring* v. *Jenkins*, 485 U.S. 415, 420 (1988), "it lacks the power to persuade." Amicus Br. 18.[7] For the reviewing court, however, the question will not be the reasonableness of the Secretary's interpretation; rather, the question will be simply whether the court should sustain the Commission's conclusion without itself applying principles of deference to the Secretary's interpretation.[8]

Thus, under the Commission's approach, the Commission would defer to the Secretary's reasonable interpreta-

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ambiguity, we find it dispositive that the agency responsible for promulgating and administering the regulation has interpreted it" in a particular manner.); *Udall* v. *Tallman*, 380 U.S. at 4 ("The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it."); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 414 ("[A] court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.").

[7] In *Gardebring*, this Court emphasized that "when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." 485 U.S. at 430.

[8] See Comm'n Br. 18 n.7 ("The question for the court below was not whether to substitute its view for that of the Secretary; that was the question which the Commission faced. The question for the court below was whether to substitute its judgment for that of the only legally binding agency position in the case—*i.e.*, the Commission's order.").

tions, and, indeed, apply accepted principles of judicial review for that evaluation. On judicial review itself, however, a court would not apply those same principles to the Secretary's interpretation (as the Commission purportedly had). Rather, the reviewing court would defer to the Commission, which, in turn, had avowedly deferred to the Secretary.

This approach is ill-conceived. It sets forth a confusing, two-tiered structure. It converts the principle of deference (at least as embodied in *Skidmore* and *Gardebring*) into a doctrine limited to inter-agency review rather than an explication of factors to guide *all* review of an agency's interpretations of its regulations. And, in contending that the *reviewing court* should not defer to the Secretary's interpretation even though *the Commission* will, the Commission asserts a self-perceived duty of deference that is essentially unreviewable by the courts.

Rather than the artificial, bifurcated approach advocated by the Commission, it is far more appropriate—and consistent with established principles of judicial review—for the reviewing court to determine the reasonableness of the Secretary's interpretation. To the extent that the Commission's analysis of the Secretary's interpretation sheds light on that inquiry (as one would expect from a sophisticated adjudicatory tribunal whose members have background in the field and whose findings of fact are conclusive if supported by substantial evidence), it should of course be carefully considered by the court; the ultimate question, however, should be the reasonableness of the Secretary's interpretation. In view of the Commission's own view of its role, this approach cannot credibly be claimed to be intrusive or disrespectful of the Commission, or to complicate or handicap its proceedings. And such an approach represents a correct application of the Administrative Procedure Act because a Commission decision rejecting the Secretary's reasonable interpretation is not "in accordance with law." 5 U.S.C. 706(2)(A).[9]

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[9] See Gov't Br. 24 n.22. Indeed, the Commission agrees that, if it rejects the Secretary's reasonable interpretation of the statute

3. Respondent and its amici contend that granting deference to the Secretary's interpretations of her regulations will undermine the Commission's statutory role. Resp. Br. 12-15; Comm'n Br. 21-24. This objection is unfounded. The Commission's statutory role is to "carry[] out adjudicatory functions." 29 U.S.C. 651(b)(3). According deference to the Secretary's reasonable interpretations of ambiguous regulations is in no way inconsistent with that important adjudicatory function; indeed, the Commission claims to accord deference to the Secretary as part of its own conception of its adjudicatory role. Amicus Br. 18.

Respondent's amici nevertheless invoke the example of such agencies as the National Labor Relations Board and the Federal Trade Commission, both of which may announce new policy through adjudication, and claim that the Commission is similarly a policymaking body. See Comm'n Br. 21-22; Chamber of Commerce Br. 20-21. The example of these agencies, however, points in precisely the opposite direction. Such agencies have authority to announce new policies *either* in rulemaking or adjudication, and the exercise of that choice lies in the agencies' informed discretion.[10] That model, however, is inapposite here. In the OSH Act, Congress explicitly denied the Commission the power to make policy through the setting of standards and the administrative enforcement of the Act; to the contrary, as we noted, Congress gave those policymaking responsibilities to the Secretary

as embodied in a regulation, the Commission's decision is not "'in accordance with law'" (Amicus Br. 17 n.6); a similar principle should apply to the Secretary's interpretation of her regulations.

[10] See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and * * * the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

and established the Commission solely as a "neutral arbiter." *Cuyahoga Valley Ry.*, 474 U.S. at 7. Unlike such entities as the National Labor Relations Board, the Commission has been vested with neither policymaking nor rulemaking authority by the pertinent statute;[11] the claim that its adjudicatory function gives it a policymaking role—rather than simply the role of a "neutral arbiter"—is baseless.

Refusing to defer to the Secretary's reasonable interpretations of her regulations would jeopardize the exercise of her statutory responsibilities. As explained in our opening brief (at 18-20), interpretive discretion to resolve ambiguities in a statute or regulation is an essential aspect of the policymaking responsibility delegated by Congress to an administrative agency. See *Department of Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990); *Chevron*, 467 U.S. at 844; *INS* v. *Stanisic*, 395 U.S. at 72. The established principle that "an agency's construction of its own regulations is entitled to substantial deference" (*Lyng* v. *Payne*, 476 U.S. at 939) rests, at least in part, on a recognition that it would place an intolerable burden on a policymaking agency to allow it to clarify the meaning of a regulation only by promulgating a new or amended regulation. To the extent that an agency's interpretation is reasonable, it is within the scope of permissible interpretive discretion. This framework reflects not an encouragement of ambiguous regulations but a recognition that, when inevitable ambiguities arise, the promulgating entity is the most appropriate entity for resolving those ambiguities; denying the Secretary interpretive discretion accorded all other promulgating entities would severely hamper the discharge of her statutory mission.[12]

[11] Cf. 29 U.S.C. 156 (NLRB's rulemaking authority); 29 U.S.C. 160 (NLRB's authority to prevent unfair labor practices). See also 15 U.S.C. 45(a) (FTC's authority to prevent unfair methods of competition and unfair or deceptive actions or practices); 15 U.S.C. 46(g) (FTC's rulemaking authority).

[12] As an alternative argument, respondent suggests that, in lieu of a principle of deference, a reviewing court should simply "arrive

4. Respondent and its amici contend that the legislative history of the OSH Act supports deference to the Commission. Resp. Br. 15-17; Comm'n Br. 19-21; Chamber of Commerce Br. 13-19. They advance two basic points: (1) deference to the Secretary's reasonable interpretations of her regulations would undermine the express purpose of creating the Commission, and (2) the legislative debates contain references to the Federal Trade Commission and the National Labor Relations Board, and since both agencies may make policy in adjudications, the Commission should similarly be given such power. Neither objection is well founded.

The express purpose of creating the Commission was to ensure fairness and due process. *Legislative History* 195, 392-393, 1147.[12] That purpose would, of course, be fully served by a regime in which courts adjudicated challenges and accorded deference to the Secretary's reasonable interpretations. It is thus implausible to suggest that an independent adjudicatory board is somehow unable to act fairly under such a decisional principle. Indeed, as noted, the Commission understands its relationship to the Secretary to require deference to her interpretations (Br. 18), and there is no reason why the statutory purpose would be endangered by a court's application of the same standard.

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at the most reasonable interpretation" of a regulation. Br. 32. It is unclear whether respondent means that the court should reach that determination on its own (*id.* at 31), or should defer to the most reasonable of the competing interpretations by the Secretary and the Commission (*id.* at 11). Either alternative trenches on the policymaking responsibility assigned to the Secretary and exercised by other promulgating entities, regardless of whether they also possess adjudicative authority. See *Gardebring* v. *Jenkins*, 485 U.S. at 430; *INS* v. *Stanisic*, 395 U.S. at 72; *Udall* v. *Tallman*, 380 U.S. at 4.

[12] Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971) [hereinafter *Legislative History*].

The references to the Federal Trade Commission and the National Labor Relations Board in the legislative history lend no support to the proposition advanced by respondent and its amici. Senator Javits referred to the Federal Trade Commission twice—first, in stating that the Occupational Safety and Health Review Commission would have "the same type of authority that the Federal Trade Commission exercises: The power to issue a cease and desist order which, if challenged within a given period of time, can be reviewed by the Circuit Court of Appeals" (*Legislative History*, 462)[14] and second, in responding to a question concerning the "makeup" of the Commission by referring to the composition and authority of the FTC (*id.* at 465, 471). These references obviously do not support the proposition that the Commission was intended to enjoy policymaking power parallel to the FTC's.[15]

As for the NLRB, Senator Javits also referred to it twice—first to state simply that its record and that of similar independent agencies "in the area of quasi-judicial adjudication" was neither so bad nor so good as to justify the reactions to the proposal for an independent adjudicative agency in the OSH Act (*id.* at 194) and, second, to state that, in the NLRB and the Equal Employment Opportunity Commission, "independent counsel"

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[14] Both the Commission and the Chamber of Commerce, in quoting this statement, include only the phrase "'the same type of authority that the Federal Trade Commission exercises,'" without the immediately succeeding explanation of the authority referred to. See Comm'n Br. 20; Chamber of Commerce Br. 18. Cf. Gov't Br. 31 n.28.

[15] Indeed, in *opposing* the Javits amendment and in supporting the assignment of adjudication to the Secretary, Senator Williams invoked the FTC as a positive example of an entity that combined policymaking and adjudication (*id.* at 467; see also *id.* at 427); conversely, in *supporting* the Javits amendment, Senator Dominick cited the FTC's combination of functions as the kind of procedure that he hoped to avoid through the creation of the Commission (*id.* at 472).

had been provided (*id.* at 477). Again, neither of these statements suggests that the Occupational Safety and Health Review Commission was intended to have a policymaking role akin to the NLRB's—a contention that would, in any case, be refuted by the stark differences between the statutory assignment of policymaking authority to the NLRB and the lack of any such assignment to the Commission. See note 11, *supra*.

Moreover, respondent and its amici disregard the critical fact that Congress explicitly rejected proposals to strip policymaking authority from the Secretary; the reasons given for this congressional decision were the Secretary's expertise in formulating policy and the legislative goal of promoting close coordination between policymaking and enforcement—two of the reasons this Court has stressed as the basis for deference. See Gov't Br. 29-31.

5. Respondent's amici also dispute our contention that principles developed in other contexts support the conclusion that the Secretary, rather than the Commission, is entitled to deference. See Comm'n Br. 27-28; Chamber of Commerce Br. 24-27.

In our brief, we noted (at 33-34) that as to the Longshore and Harbor Workers' Compensation Act, this Court has explained that the interpretations of the Benefits Review Board are not entitled to deference because the Board "is not a policymaking agency." *Potomac Elec. Power Co. (Pepco)* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Respondent's amici offer three responses: (1) the courts of appeals have been in conflict about whether to follow *Pepco*; (2) the Longshore Act context and the OSH Act context are distinguishable; and (3) the Court's statement in *Pepco* can be dismissed as dictum.

The first objection is patently erroneous. *Every* court of appeals that has considered the matter since *Pepco* has concluded that the Benefits Review Board, as a purely adjudicatory entity, is not entitled to deference. See

Gov't Br. 34-35 n.33 (collecting cases).[18] The second objection is also insubstantial. The Longshore Act context and the OSH Act context are not distinguishable on the pertinent point—that, like the Benefits Review Board, the Commission is not a policymaking agency. Finally, although this Court's observation concerning the Benefits Review Board may not have been strictly necessary to the holding in *Pepco*, the statement represents a considered conclusion regarding the role of the Board, and the Court's observation relies on two leading court of appeals decisions, which had similarly held that the Board's interpretations were not entitled to deference because the Board was not a policymaking entity. See 449 U.S. at 278 n.18. This Court's statement in *Pepco* is thus entitled to more than the curt dismissal suggested by respondent's amici, and, as noted, the courts of appeals have unanimously understood *Pepco* to mean that the Board's interpretations are not entitled to deference.

In our brief, we also noted that, in the similar administrative structure created by the Federal Mine Safety and Health Act of 1977, the Secretary of Labor's interpretations, rather than the Federal Mine Safety and Health Review Commission's interpretations, have received deference when their interpretations conflict. Br. 35-36. Although the amici claim that the Mine Safety and Health context is distinguishable (Comm'n Br. 27-28; Chamber of Commerce Br. 25-26), they are unable to identify any material difference between the two administrative structures that would justify different principles of deference. The amici also claim that the court of appeals decisions have been conflicting (Comm'n Br.

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[18] As we pointed out (Br. 34-35 n.33), most courts of appeals have also held that, as a logical corollary, the interpretations of the policymaking entity (the Director of the Office of Workers' Compensation Programs) are entitled to deference; as we also pointed out (*ibid.*), however, two courts of appeals have suggested that, at least in some circumstances, neither the Board nor the Director is entitled to deference. Cf. note 12, *supra*.

28; Chamber of Commerce Br. 25-26), but the suggestion is simply inaccurate. For instance, the Chamber of Commerce (at 26) cites *Brock* v. *Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987), but fails to mention that the decision explicitly reiterates the principle of "*Chevron* deference to the Secretary's, not the Commission's, interpretation of the Act." *Id.* at 1146 n.41. For its part, the Commission claims (at 28) that "courts have disagreed about the appropriate deference" in the Mine Act context; in fact, the decisions addressing the issue make it clear that, in cases of conflict between the Secretary and the Commission, the Secretary should receive deference. See Gov't Br. 35-36.[17]

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[17] The Commission also claims that examples concerning the Board of Immigration Appeals (BIA) and the Merit Systems Protection Board (MSPB) support its position. Amicus Br. 22 n.9. This claim is incorrect. With regard to the BIA, the statute vests administrative authority in the Attorney General (8 U.S.C. 1103(a)); the Attorney General, in turn, has delegated authority to the Commissioner of the Immigration and Naturalization Service (8 C.F.R. 2.1) and to the Board of Immigration Appeals, under the supervision of the Executive Office for Immigration Review (8 C.F.R. 3.0-3.2). The Attorney General retains authority to review BIA decisions (8 C.F.R. 3.1(h)). Thus the BIA is simply a delegate of the Attorney General for the statutory authority conferred *on him*; to the extent that the BIA's views would conflict with the Attorney General's views, the former would not be entitled to deference. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), and the other decisions cited by the Commission, the claim for deference arose in a context in which the BIA, INS, and the Attorney General were in agreement.

As for the MSPB, unlike the Commission, it is given limited substantive rulemaking authority, and it was to the MSPB's interpretation of an MSPB-promulgated regulation that the Court deferred in *Cornelius* v. *Nutt*, 472 U.S. 648, 657-659 (1985), a case in which the Office of Personnel Management (OPM) agreed with the MSPB. Furthermore, the Federal Circuit, which now has exclusive jurisdiction of most MSPB appeals (5 U.S.C. 7703(b)(1)), has explicitly accorded deference to the OPM, rather than the MSPB, in a case in which the MSPB and the OPM disagreed. See *Horner* v. *Andrzjewski*, 811 F.2d 571, 574-576 (Fed. Cir. 1987). In contrast, *United States* v. *Paddack*, 825 F.2d 504, 513 (D.C. Cir. 1987), relied on by the Commission, was a case in which the court found no "legally relevant interpretation" by the agency that had drafted the regulation in dispute and thus no conflict with the interpretation of the adjudicating agency.

Amicus American Iron and Steel Institute (AISI), in turn, claims that the Tax Court, rather than the IRS, receives deference from the appellate courts. Br. 10-11. Several lower court decisions have refused to give deference to the Tax Court. See, *e.g.*, *Commissioner* v. *Hendrickson*, 873 F.2d 1018, 1022 (7th Cir. 1989); *Lynch* v. *Commissioner*, 801 F.2d 1176, 1178-1179 (9th Cir. 1986); *Vukasovich, Inc.* v. *Commissioner*, 790 F.2d 1409, 1413 (9th Cir. 1986). And in our view, the tax statute itself precludes special deference to the Tax Court in the event of conflicting interpretations between the Tax Court and the Commissioner. See 26 U.S.C. 7482(a)(1) (providing for appellate review of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury"). See also *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476-477 (1979).

6. Respondent also maintains that the Secretary's interpretation is unreasonable on a number of grounds and that, even though the court of appeals did not resolve the reasonableness of the Secretary's interpretation, this Court should decide the question in the first instance. Br. 23-29. As discussed in our opening brief (at 37 n.37), we believe that, since the court of appeals has not addressed this matter, a remand to that court is appropriate. But if the issue is to be considered here, respondent's contentions should be rejected and the Secretary's interpretation sustained.

The coke oven emission standard incorporates the general respiratory standard. See 29 C.F.R. 1910.1029(g)(3) (incorporating 29 C.F.R. 1910.134), quoted at Pet. App. 122a. The incorporated standard states, in part, that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, * * * and, finally, to wear it in a test atmosphere." 29 C.F.R. 1910.134(e)(5), quoted at Pet. App. 115a. Under the Secretary's interpretation, this provision does not simply require an employer to place an employee in a test atmos-

phere wearing a respirator and then leave the employer free to ignore the test results; rather, it also requires that, if the test indicates an improper fit, the employer must provide the employee with a respirator that fits. Contrary to respondent's suggestion, the language of the regulation, referring both to a respirator's being "fitted properly" and worn "in a test atmosphere," supports this interpretation. Indeed, any other interpretation would strip the regulation of its force.

Respondent nevertheless maintains that the Secretary's interpretation of Section 134 is unreasonable. Respondent emphasizes that another provision of the coke oven standard (29 C.F.R. 1910.1029(g)(4)(i), quoted at Pet. App. 122a) requires an employer to ensure that "the respirator is fitted properly," and urges that the Secretary's interpretation of Section 134 be rejected because of this specific fit requirement. Resp. Br. 27-28. This contention misapprehends the role of Section 134 in the administration of the OSH Act. Section 134 is relevant in three different types of situations: (1) when it applies directly; (2) when it applies through incorporation in a particular standard and the incorporating standard has no specific fit requirement (as in the standard for vinyl chloride, 29 C.F.R. 1910.1017(g)(3)); and (3) when it applies through incorporation in a particular standard and the incorporating standard has a specific fit requirement (as in the standard for asbestos, 29 C.F.R. 1910.1001(g)(3) and (4), and App. C). In most of the regulations involving the third situation, the specific fit requirement includes a general statement that the employer must ensure that the respirator is "fitted properly" and then imposes highly specific additional requirements (*e.g.*, the asbestos standard, *supra*). In the first two categories, the rejection of the Secretary's interpretation of Section 134 would prevent the Secretary from imposing a fit testing requirement even though, in these situations, an alternative specific fit requirement—the professed basis for rejecting the Secretary's interpretation—does not exist.[18]

Respondent also errs in suggesting (at 27 n.24) that the citation issued in this case represents merely a compliance officer's mistake. Section 1029(g)(4)(i) now consists of only a single sentence containing a general fit requirement. See Pet. App. 122a. Initially, however, consistent with many other standards that incorporate Section 134 and impose additional specific requirements (the third category outlined above), Section 1029(g)(4)(i) also contained a specific additional requirement—quantitative fit testing—and the sentence now remaining in Section 1029(g)(4)(i) served in large part as an introduction to that specific requirement. See 41 Fed. Reg. 46,787 (1976). After the quantitative fit requirement was invalidated in litigation, only the initial sentence remained. See *American Iron & Steel Inst.* v. *OSHA*, 577 F.2d 825, 839 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980). Although the compliance officer may have been mistaken in believing that the first sentence of Section 1029(g)(4)(i) had also been invalidated (cf. Pet. App. 43a), he was not at all incorrect in concluding that, with the invalidation of the quantitative fit requirement in Section 1029(g)(4)(i), the general fit testing requirement imposed by Section 134 and incorporated in Section 1029(g)(3) remained pertinent.

Finally, respondent's related suggestion (at 24-25; see also Comm'n Br. 18) that the Secretary's interpretation is merely a litigation position for this case is also incorrect. As an initial matter, respondent cannot claim unfair surprise because, as the Commission observed, OSHA's compliance officer had explicitly warned respondent that its employees' respirators should be "fitted in banana oil or irritant smoke" and respondent's training film in-

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[18] The Secretary currently interprets Section 134 to impose this respirator fit testing requirement. See OSHA Instruction CPL 2-2.29, *reprinted in* 1 O.S.H. Rep. (BNA) 21:8321 (1986).

structed its employees that "if an employee detected the presence of banana oil, a new respirator would be supplied." Pet. App. 38a; see also Pet. App. 81a.[19] In any event, respondent's suggestion is incorrect: Both before and after the citation at issue here, the Secretary has cited employers for violations of Section 134 on the ground that the employer did not ensure proper respirator fit.[20] And as noted above, that interpretation is currently embodied in OSHA's official program instructions. See note 18, *supra*.[21] The interpretation represents an im-

[19] The Commission (Br. 26-27) vehemently objects to this and related observations in our opening brief (at 27, 37), but does not dispute the underlying facts. We highlighted those facts and the consequences of the court of appeals' decision to emphasize the instability and irrationality created by a regime in which the regulatory interpretation by the policymaking and administering entity may be rejected without a judicial determination that the interpretation is unreasonable.

[20] *E.g.*, OSHA Inspection H9371-055 (Mar. 19, 1979); OSHA Inspection F5129-060 (Nov. 20, 1979); OSHA Inspection 102806866 (May 22, 1989); OSHA Inspection 100566306 (Feb. 15, 1990); OSHA Inspection 017799891 (June 14, 1990).

[21] Even without regard to the prior and subsequent agency actions relying on this interpretation, the fact that the interpretation was the very basis for the administrative action (the citation) serves to distinguish it from a situation in which the interpretation at issue is simply a post hoc rationalization by appellate counsel. Cf. *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212 (1988).

Amici also contend that the Secretary's interpretation has been inconsistent (Comm'r Br. 18; Chamber of Commerce Br. 22 n.8; see also Pet. App. 44a n.14). The claimed inconsistency, however, relates to testing method, not to whether Section 134 imposes a fit testing requirement at all; as respondent acknowledges (Br. 24 n.21), the question whether a test atmosphere was the required method is not at issue. Like the current program instruction, the previous administrative document interpreted Section 134 as requiring that "[t]he respiratory protective equipment must be properly fitted." Industrial Hygiene Field Operations Manual, ch. XII, Sec. A, para. 4(d) (Jan. 1, 1979), *reprinted* in Empl. Safety & Health Guide (CCH) ¶ 4488.10 (1979).

portant aspect of OSHA's compliance program, and its rejection would have significant consequences for OSHA's respiratory enforcement efforts.[22]

* * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
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OCTOBER 1990

[22] Respondent also emphasizes (at 27-28) that Section 134 was a "national consensus standard" adopted under the expedited procedure of 29 U.S.C. 655(a). As discussed in our opening brief (at 25 n.23), the adoption of a national consensus standard as a regulation of the Secretary is itself a policymaking exercise, and the Secretary's interpretations of such a standard are accordingly entitled to deference. And even if the Secretary's role in adopting, rather than writing, the standard bears on the appropriate degree of deference, it does not affect the reasons for deference as a basic principle of review (the Secretary's role in setting policy and enforcing the standard on a day-to-day basis), and it certainly does not justify according deference to the Commission, which has neither written nor adopted the standard, nor administered it on an ongoing basis.

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No. 89-1541

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

and

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, most of whom are covered by the Occupa-

tional Safety and Health Act and are therefore affected by the issue presented in this case.

SUMMARY OF ARGUMENT

It is agreed that the Occupational Safety and Health Act grants the Secretary of Labor the authority to issue a Coke Oven Emissions Standard and the authority to include in that Standard a requirement of atmospheric testing of respirator fit. The only question is whether the Secretary in issuing her Standard has in fact promulgated such a requirement.

The settled law in such cases is that a rulemaker's construction of her own rule is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). Because the Court of Appeals determined that it is "certainly possible" to interpret the Coke Oven Emissions Standard as the Secretary has interpreted the Standard, Pet. App. 11a, the principle just stated requires that the Secretary's construction be accepted.

The role of the Occupational Safety and Health Review Commission under the OSH Act provides no basis for granting the Commission the authority to reject the Secretary's construction of a standard in favor of the Commission's construction. The language of the statute and the legislative history both establish that the Review Commission's role is essentially that of a factfinder. The principle that an adjudicative body should defer to a rulemaker's construction of her own rule is therefore fully applicable in defining the Review Commission's role *vis-à-vis* that of the Secretary.

Indeed, the considered refusal of Congress to grant the Review Commission, or any body outside the Labor Department, any role in OSH Act standard-setting gives this principle added force in the present context. Even putting aside the obvious point that the Secretary is in

a better position than the Commission to determine the meaning of the Secretary's own standards, it is far more consistent with the OSH Act's division of authority to allow the Secretary to determine the precise requirements of a standard when the terms of the standard are ambiguous than to assign that role to the Review Commission.

ARGUMENT

A. The dispute in this case is whether the Coke Oven Emissions Standard promulgated by the Secretary of Labor requires employers to engage in atmospheric testing to assure that the respirator worn by an employee exposed to coke oven emissions fits properly, so that carcinogenic fumes do not enter the employee's respiratory system. Pet. App. 2a, 10a, 79a.[1] The Secretary of Labor, who promulgated the Standard, takes the position that the Standard does require employers to assure proper fit through atmospheric testing. The Occupational Safety and Health Review Commission disagrees.

If the answer to the question whether the Coke Oven Emissions Standard requires employers to assure proper respirator fit through atmospheric testing turned on construing the terms of the Occupational Safety and Health Act (OSH Act), it would be a matter of some difficulty to determine what degree of deference, if any, might be owed to the respective views of the Secretary and the Review Commission on such a question.[2]

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[1] "Atmospheric testing" consists of having the employee wear the respirator in a room filled with noxious vapors. If the employee can detect the odor, this shows that the respirator does not fit properly and is not providing adequate protection. Pet. App. 3a, 79a.

[2] "On a pure question of statutory construction, [the] first job [of a court] is to try to determine congressional intent, using 'traditional tools of statutory construction.'" *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987), quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987). On such a question there is no occasion for deference to an administrative inter-

But that is *not* this case. Respondents do not contend that anything in the OSH Act would have prevented the Secretary from requiring atmospheric testing of respirator fit in the Coke Oven Emissions Standard; respondents' submission is solely that the Secretary did not in fact promulgate such a requirement. In other words, the only question for decision is whether the Secretary actually promulgated the atmospheric testing requirement she claims to have promulgated.

This Court some time ago formulated the standard that governs where, as here, the question to be decided is one of a rulemaker's intent in promulgating a rule: in such a case "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). *See also Immigration Service v. Stanisic*, 395 U.S. 62, 72 (1969) (rulemaker's interpretation of a rule is "dispositive" unless it is "plainly" contrary to the language of the rule); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977) (same).

As the Court put it in *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1850 (1989): "This interpretation of the agency's own regulation is not 'plainly erroneous or inconsistent with the regulation,' and is therefore controlling" (quoting *Bowles v. Seminole Rock Co., supra*).[3]

B. Here, the Court of Appeals did *not* conclude that the Secretary's interpretation of the Coke Oven Emissions Standard was plainly at odds with the language of the Standard. To the contrary, that court stated that it is "certainly possible" to interpret the Standard as the Secretary does. Pet. App. 11a. As we develop in the margin,

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pretation unless Congress has left a "gap" for an agency to fill, *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984); that is to say, unless there has been a "legislative delegation to an agency [to resolve] a particular question," *id.* at 844.

The question whether the *Secretary* has been granted such interpretive authority as to particular matters under the OSH Act is *not* presented here, and we express no view on that question.

Nor does this case present the question of the *Review Commission's* role in deciding questions of statutory construction. However, for the reasons discussed *infra* pp. 6-12, we think it clear that the Commission has not been granted "the sort of specific responsibility for administering the law that triggers *Chevron*," *Crandon v. United States*, 110 S.Ct. 997, 1011 (1990) (Scalia, J., concurring in the judgment), and that the Commission's views on questions of statutory construction would therefore *not* be entitled to any particular deference. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (where an adjudicative board "is not a policymaking agency[,] its interpretation of the [statute] . . . is not entitled to any special deference from the courts").

[3] Somewhat different considerations may come into play if a rule, although not turning on a pure question of statutory construction, *see supra* p. 3, n.2, represents an attempt to effectuate what the agency discerns as the intent of the Legislature on a particular point. Such a situation was presented, for example, in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987), which turned on the quantum of evidence needed to establish an "interim presumption" of eligibility for black lung disability benefits under regulations issued by the Secretary of Labor.

On the one hand, there was, as the *Mullins Coal* Court observed, "no need to parse statutory language to decide th[at] case," 484 U.S. at 140, because there was no claim that the regulations as interpreted by the Secretary violated the governing statute, *id.* at 139. On the other hand, it was argued that "the Secretary's reading is not faithful to the purposes of the [statutory] program as reflected in its legislative history," *id.* at 140, because that history evinced a "clear congressional mandate for interim presumptions to reduce the number of benefit denials by both the [Social Security Administration] and Labor," *id.* at 152. Thus, *Mullins Coal*, while not involving the "pars[ing of] statutory language," required a detailed analysis of the statutory scheme and the intent of Congress with respect to the matter in dispute. *See id.* at 152-59. In that context the Court did not treat the view of the rulemaking agency as *dispositive*, but the Court stated nonetheless that "'[t]he agency's interpretation . . . is deserving of substantial deference 'unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 159, *quoting Bowles v. Seminole Rock Co., supra.*

the Court of Appeals showed a talent for understatement; on its face the Standard fairly read means what the Secretary says the Standard was intended to mean.[4]

The Court of Appeals nonetheless "defer[red] to the interpretation chosen by the Commission." *Id.* This was clear error. As we now show, nothing in the nature of the Review Commission or in the statute that creates the Commission provides a basis for departing from the general principle that the interpretation of a rule articulated by the *rulemaker* is to be accorded decisive weight.

1. The Review Commission was created, as the statute declares, "for carrying out adjudicatory functions under the Act." OSH Act § 2(b)(3), 29 U.S.C. § 651(b)(3).

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[4] The Coke Oven Emissions Standard at 29 C.F.R. § 1910.1029(g)(3) incorporates the requirements for respirator programs set forth in 29 C.F.R. § 1910.134. The latter section provides in part that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly . . ., and, finally, to wear it in a test atmosphere." 29 C.F.R. § 1910.134(e)(5).

The Administrative Law Judge who heard this case concluded that this language can easily be read to impose the requirements urged by the Secretary. *See* Pet. App. 79a. Two members of the Review Commission disagreed, holding that § 1910.1029(g)(3) is "a training standard; it does not require the employer to assure proper fit of an employee's respirator." Pet. App. 40a. Those two Commissioners concluded that the references to "hav[ing the respirator] fitted properly" and to wearing the respirator "in a test atmosphere" apply only "during training." Pet. App. 41a. The third Commissioner dissented, holding that even if the provisions in question are viewed as a "training standard," those provisions were violated, because "[t]he purpose of paragraph 1910.134(e)(5) is to ascertain whether the respirator provides protection (have it fitted properly), and to prepare employees to work and function in a toxic environment." Pet. App. 51a, 53a.

The Court of Appeals accepted the interpretation adopted by the 2-1 Commission majority. The court below held that "[w]hile it is certainly possible to reach an alternate interpretation of the ambiguous regulatory langauge . . ., we defer to the interpretation chosen by the Commission," because "it cannot be said that the Commission's interpretation of § 1910.1029(g)(3) in this case was unreasonable." Pet. App. 10a, 11a.

The Secretary, not the Commission, has the exclusive authority to promulgate occupational safety and health standards, *see* OSH Act § 6, 29 U.S.C. § 655, and to grant variances from such standards, *see* OSH Act §§ 6(b)(6), (d), 29 U.S.C. § 655(b)(6), (d). The Secretary is also assigned the prosecutorial role under the Act: the Secretary conducts workplace inspections, *see* OSH Act § 8, 29 U.S.C. § 657, and issues citations and proposed penalties for alleged violations discovered in an inspection, *see* OSH Act § 10(a), 29 U.S.C. § 659(a).

If a citation is not contested—and more than 98% of the Secretary's citations are *not* contested[5]—the Review Commission does not become involved in the merits of the Secretary's enforcement action. In the small minority of cases where an employer *does* contest the citation or proposed penalty, or where an employee or employees' representative contests the length of time for abatement specified in the citation, "the Commission shall afford an opportunity for a hearing . . . [and] shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . ." OSH Act § 10(c), 29 U.S.C. § 659(c). If the citation is affirmed, only the Secretary may seek enforcement of the administrative order in a court of appeals. OSH Act § 11(b), 29 U.S.C. § 660(b).

It could not be clearer that the Review Commission's role is confined to "adjudicatory functions," as § 2(b)(3) declares. Certainly nothing in the OSH Act grants the Review Commission any powers beyond those normally possessed by an adjudicative body created to hear enforcement proceedings brought by a public prosecutor.

Indeed, the statute suggests that the Commission's function is even *narrower* than the role customarily

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[5] See Current Report, 18 O.S.H. Rep. 1668 (BNA) (Mar. 1, 1989).

played by such an adjudicative body. For § 10(c), quoted above, states only that the Commission shall make "findings of fact," and does not mention any role for the Commission in interpreting the law or the Secretary's standards.

2. The legislative history confirms that the Review Commission's role in this regard is, at most, like that of a court. That history teaches that the Commission was created for a limited purpose, *viz.*, "to avoid giving the Secretary both prosecutorial and *adjudicative* powers," *Cuyahoga Valley R. Co. v. Transportation Union*, 474 U.S. 3, 7 (1985) (emphasis added).

a) At the outset of the OSH Act's development, the bills reported out of both the Senate and House Committees would have given the Secretary three distinct health and safety powers: standard-setting, prosecution of violations of the Act and of the standards promulgated thereunder, and administrative adjudication of the merits of citations alleging such violations. *See* S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970), *reprinted in* Senate Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health of 1970* (Comm. Print 1971) ("Leg. Hist.") 148, 155; H.R. Rep. No. 1291, 91st Cong., 2d Sess. 18-19, 24 (1970), *reprinted in Leg. Hist.* 348-49, 854.

The Administration, on the other hand, favored "separat[ing these powers] by giving the quasi-legislative power to promulgate standards to a five-man board and the quasi-judicial power of adjudication to an independent three-man Panel," leaving the Secretary with only the prosecutorial function of issuing and prosecuting citations of alleged violations of the Act and of standards issued by the independent board. S. Rep. No. 1282 at 54, *reprinted in Leg. Hist.* 193 (Individual Views of Senator Javits).

Senator Javits, the ranking minority member of the Senate Labor Committee, in turn, had suggested a compromise that would have given the Secretary the standard-setting and prosecutorial authorities while conferring the authority to "adjudicate enforcement cases" on an independent panel. S. Rep. No. 1282 at 55, *reprinted in Leg. Hist.* 194 (Individual Views of Senator Javits). *See also* S. Rep. No. 1282 at 15, *reprinted in Leg. Hist.* 155 (discussing Committee's rejection of an independent board for "adjudicative functions").

On the Senate floor, Senator Javits succeeded in gaining adoption of his compromise as an amendment to the Committee bill. *See Leg. Hist.* 478-79. His supporting argument was that it would not be fair for the Secretary to act as both "prosecutor and judge" in enforcement cases, because this would put the Secretary in a position where "[a]ny finding by the Secretary in favor of a respondent would be essentially a repudiation by the Secretary of his own Department's employees." *Leg. Hist.* 392. *See also* S. Rep. No. 1282 at 56, *reprinted in Leg. Hist.* 195.

Other supporters of an independent adjudicative body sounded the same theme. *See Leg. Hist.* 298 (Senator Saxbe) (under the Committee bill, the Secretary would act not only as prosecutor but as "judge and jury" as well); *Leg. Hist.* 440 (Senator Dominick) (Committee approach would make it difficult for a Labor Department official "to determine whether he was at any given time filling the role of judge, prosecutor, or inspector"); S. Rep. No. 1282 at 63, *reprinted in Leg. Hist.* 202 (Minority Views of Senators Dominick and Smith) (independent adjudicative body was needed to "obviate the inevitable conflict which arises when the Secretary must review his own actions as carried out by the various subordinate levels of the Department").

In the House, a bill that had been introduced by Representatives Steiger and Sikes as a substitute to the Committee bill was passed. The Steiger-Sikes bill, like the

Javits compromise, provided for an independent adjudicatory panel. *Leg. Hist.* 1092, 1098-99. This provision met with favor even from those members of the House who supported the Committee bill. Thus Representative Perkins—the Committee chairman—stated that if the Steiger-Sikes substitute were defeated, the Committee bill would be amended to conform to the language adopted by the Senate under which "contested citations will be considered by an independent court, so to speak, an independent review commission." *Leg. Hist.* 1074.[6]

The arguments of the House proponents of this approach were the same as in the Senate. *See Leg. Hist.* 1015 (Representative Eshleman) (in the Committee bill "the Secretary of Labor is a combination rulesmaker, policeman, judge and jury"); *Leg. Hist.* 980 (Representative Smith) ("[t]he substitute bill provides for a tribunal other than the Secretary to act as judge and jury").

The proponents of the Javits compromise emphasized, too, that although adjudication would be placed in the hands of an independent commission, "standards . . . are left in the hands of the Secretary of Labor." *Leg. Hist.* 392 (Senator Javits). *See also Leg. Hist.* 1074 (Representative Perkins). Senator Javits explained that he was content to leave the Secretary full standard-setting authority as well as prosecutorial authority because "[t]he enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberative act." *Leg. Hist.* 464.

Thus, standard-setting was left to the Secretary, while adjudication of enforcement cases, which Congress viewed as "a case by case proposition," was made the

[6] In contrast to the Javits compromise adopted in the Senate, the Steiger-Sikes substitute also provided for an independent board to set health and safety standards. *Leg. Hist.* 1094-96. This provision was highly controversial, *see, e.g., Leg. Hist.* 1074-75 (Representative Perkins), and the approach of the Javits compromise prevailed in conference, *Leg. Hist.* 1146, 1186.

province of the Review Commission, because such an adjudication "does not apply across the board to every member of industry" but involves the facts pertaining to "[o]ne particular . . . company." *Id.* (Senator Javits).

b) In a thoughtful opinion, Judge Breyer has summarized the lessons of the legislative history just discussed:

> This history suggests that OSHRC's mission is primarily factual in nature; its role is to hear charges of violations, *see* [*Leg. Hist.*] at 472 (remarks of Sen. Dominick, noting that purpose of OSHRC is to "decide whether the rules . . . have in fact been violated"); and it seeks to guarantee that those charges are adjudicated fairly—in particular, without the bias that can arise from placing prosecutorial and adjudicative functions within a single agency. *See, e.g., Elman, Administrative Reform of the Federal Trade Commission*, 59 Geo. L.J. 777, 810 (1971). The power to adjudicate inevitably encompasses, to some degree, the power to "declare" the law. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-62 (4th Cir. 1974). But Congress must have foreseen that any such OSHRC power would be limited. After all, Congress specifically rejected a plan to place rulemaking powers in a body independent of OSHA. And, this fact suggests that Congress did not intend OSHRC to possess broad powers to set policy through the creation of rules—powers that other agencies sometimes exercise in adjudicatory (as well as rulemaking) proceedings. *See generally* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965) (describing National Labor Relations Board's use of adjudicatory proceedings for rulemaking purposes). This history suggests to us that, in cases of a conflict between an OSHRC interpretation of OSHA rules and OSHA's interpretation, Congress intended OSHA to be the more authoritative source. [*Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 65-66 (1st Cir. 1985)].

We submit that, if anything, Judge Breyer is too tentative. For present purposes the critical point is that the legislative history establishes that the Review Commission's role *vis-à-vis* the Secretary is like that of a court. The consistent refrain was that the Commission's role is "adjudicative," that of "judge and jury," "an independent court, so to speak." *See supra* pp. 8-10.[7] Thus, the principle recognized in this Court's decisions cited *supra* pp. 4-5—*viz.*, that a court should not substitute its judgment as to the meaning of a rule for that of the rulemaker—is fully applicable in defining the role of the Commission *vis-à-vis* that of the Secretary.[8]

Indeed, Congress' considered decision to assign standard-setting to the Secretary rather than to an independent body makes that principle particularly binding. *See supra* pp. 8-11. Congress' clear choice was that "[i]t is the Secretary, not the Commission, who sets the substantive standards for the workplace." *Cuyahoga Valley R. Co. v. Transportation Union*, *supra*, 474 U.S. at 6-7. Given that choice the determination whether the Coke Oven Emissions Standard fairly read does or does not require atmospheric testing of respirator fit is a determination to be made by the Secretary, not the Review Commission.

[7] The requirement that members of the Commission be selected "from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act," OSH Act § 12(a), 29 U.S.C. § 661(a), does not suggest that the Commission's role is broader than that of a court. Given the technical nature of the matters the Commission must address in its factfinding, it is desirable that a Commissioner possess special expertise. But this is not inconsistent with the view that the Commission's role is no broader than that of a court; for the desirability of special expertise has been noted even as to certain Article III courts. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 560 (1962) (opinion of Harlan, J.) ("In certain areas of federal judicial business there has been a felt need to obtain . . . the special competence in complex, technical and important matters that comes from a narrowly focused inquiry").

[8] The Court of Appeals therefore missed the point in stating that "an adjudicative function necessarily encompasses the power to 'declare' the law." Pet. App. 7a. Unlike the situation where statutory construction is at issue, *see supra* p. 3, n.2, the power of an adjudicative body to "declare the law" has never been understood to involve a general right to declare that a regulation means something other than what the author of the regulation says it means. *See supra* pp. 4-5.

3. There is no reason to depart in this case from the presumption that it is the rulemaker, not an adjudicative tribunal, that best understands the meaning of a particular rule. To be sure, if the Secretary arbitrarily were construing the Coke Oven Emissions Standard one way for some companies and another way for others, the concerns that led Congress to create the Review Commission might arguably be implicated. *See supra* pp. 10-11. But that is *not* this case. The Secretary has adopted an across-the-board interpretation that the Coke Oven Emissions Standard requires atmospheric testing of respirator fit.

So too, we may grant that the Secretary's authority to promulgate standards does not empower her to modify a standard without resorting to the required rulemaking proceedings. *See* OSH Act § 6(b), 29 U.S.C. § 655(b).[9] But, again, that is *not* this case. As the Court of Appeals acknowledged, the Standard can fairly be construed to require atmospheric testing of respirator fit, *see supra* p. 5, and there is accordingly no more reason (in fact, there is *less* reason) to view the Secretary's construction of the Standard as an impermissible modification than there is to view the *Review Commission's* construction as an impermissible modification.

Indeed, it should go without saying that the Secretary, who promulgated the Standard, is in a better position than the Commission to know the "true" meaning of the

[9] This consideration explains why an administrative construction of a regulation cannot prevail if the language of the regulation is *plainly* to the contrary. *See supra* pp. 4-5.

Standard's provisions.[10] But even if one were to discount the reliability of the Secretary's "institutional memory," *Donovan v. A. Amorello & Sons, supra*, 761 F.2d at 66, the fundamental point would remain: where a standard is ambiguous and must therefore be given content in some particular respect, the legislative judgments embodied in the OSH Act dictate that it is far more appropriate that the requirements of the standard be determined by the Secretary, who was chosen by Congress to set the standards in the first place, than by the Review Commission, whose role is essentially limited by Congress to that of factfinding. The Court of Appeals' decision to the contrary is inconsistent both with the general principles that govern interpretation of regulations and with the division of authority between the Secretary and the Commission that is central to this specific statutory scheme.

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[10] As Judge Breyer has put it:

> [P]ractical administrative considerations favor looking to OSHA for a more authoritative interpretation of the regulation. Since OSHA employees chose the language of the regulation, OSHA is more likely to have an institutional memory of the regulation's purposes and meaning. . . . Moreover, OSHA's experience as both a "legislating" and "enforcing" agency provides it with expert knowledge of the likely practical outcomes of different interpretations. OSHRC, too, has acquired some expertise in this area from its experience in adjudicating disputes over OSHA regulations, *cf. Legislative History, supra*, at 429 (remarks of Sen. Williams), and this expertise entitles its views to special consideration in appropriate cases. But, that expertise arises out of its having adjudicated many cases; it is likely factual in nature; and it necessarily concerns examples of rule violations (which are presumably less typical than instances of compliance).
>
> In sum, practical considerations of expertise as well as legislative history of Congressional intent suggest that OSHA speaks with greater authority when the interpretation of OSHA's substantive rules is at issue. [*Donovan v. A. Amorello & Sons, supra*, 761 F.2d at 66 (citation omitted)].

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
and CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE

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Amici Curiae file this Brief in support of Respondents pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The written consents of Petitioner and Respondents have been filed with the Court.

INTEREST OF AMICI CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the na-

tion's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in a balanced and proper interpretation of occupational safety and health regulations, and are particularly concerned about the issue in this case.

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a voluntary nonprofit association of domestic companies engaged in the manufacture and sale of motor vehicles in the United States. MVMA's members assemble ninety-four percent of the cars, trucks and buses produced in the United States and operate more than three hundred manufacturing and related facilities. Most of MVMA members' 730,000 employees are subject to regulations promulgated by the Occupational Safety and Health Administration ("OSHA") and, therefore, have a stake in the outcome of this litigation.

NAM and MVMA represent employers nationwide, all of whom have a significant interest in the question presented in this case. This Court has been asked to determine whether judicial deference is owed to the Occupational Safety and Health Review Commission ("Commission") or to the Secretary of Labor ("Secretary") when they differ in their interpretations of an admittedly ambiguous regulation issued pursuant to the rulemaking provisions of the Occupational Safety and Health Act ("the Act" or "the OSH Act").

At the heart of this question is how Congress envisioned the Commission's role in the statutory scheme and what powers are necessary for it to fulfill its intended function. The legislative history demonstrates that Congress withdrew adjudicative authority from the Secretary and created the Commission in response to the business community's strongly held concern that combining rulemaking, prosecutorial and adjudicative authority in the Secretary could produce decisions biased

against employers. Congress went to great lengths to keep the Secretary's prosecutorial power separate and distinct from the Commission's judicial power.

The only way to effectuate the Legislature's intended separation of powers is to afford judicial deference to the Commission when its interpretation of an ambiguous regulation differs from the Secretary's, especially when, as here, the Secretary has expressed no interpretation at all prior to prosecuting the enforcement proceeding.

It is common practice for OSHA's enforcement personnel to adopt an interpretation of a safety or health standard when issuing citations for alleged violations of the Act to employers as occurred in this case. The OSHA district office believed that employees of CF&I Steel Corporation were not properly fitted with respirators and were, therefore, exposed to respirable coke oven emissions. The officials believed, erroneously as it turns out, that the occupational health standard which applies to this situation was not enforceable. Accordingly, they determined to cite the employer under another standard, which if read in isolation, might arguably proscribe the alleged violative conduct. In sum, local agency enforcement personnel observed what they believed was an unsafe condition. When they did not find a regulation which covers the condition, they determined to "interpret" another regulation in a manner to obtain abatement.

Judicial deference to the Secretary's, or, in reality, her staff's, prosecutorial opinions in circumstances like these would nullify the Commission's role as an independent adjudicatory body and hold employers to "rules" on which they never had an opportunity to comment and on which they received no prior notice. Such concentrated power in the Secretary is precisely what Congress sought to avoid in creating the Commission. If the Commission is denied the power to interpret ambiguous regulations,

it will become an "umpire" calling balls and strikes on purely factual issues instead of acting as the independent adjudicatory body Congress intended and upon which many employers relied in supporting occupational safety and health legislation.

The Commission's independent adjudicatory role is as vital to continued employer acceptance of the Act as it was to the Act's original passage, and, accordingly, NAM and MVMA submit that this Court should affirm the Tenth Circuit's ruling in this case giving deference to the Commission's interpretations of ambiguous OSHA regulations.

SUMMARY OF ARGUMENT

Judicial deference to Commission interpretations of ambiguous OSHA regulations fulfills the Legislature's intent in establishing the Commission as an independent adjudicatory body created to provide all parties a fair and unbiased hearing in enforcement proceedings. If the Commission were forced to accept the Secretary's "interpretation" of an ambiguous regulation made for the purpose of prosecuting a citation, the Commission would find itself acting merely as a fact-finding body. The Commission would have no true adjudicatory power.

Furthermore, deference to the Secretary's interpretation of an ambiguous regulation would permit the Secretary to, in effect, act outside the deliberative rulemaking framework provided by the Act and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, by adopting policies or amending rules as a litigant during adjudication, when Congress vested the adjudicatory role solely in the Commission. Finally, deference to the Secretary's position in this case would directly conflict with this Court's rulings rejecting the notion of deference to agency litigating positions.

The Tenth Circuit's ruling recognizes that the Commission's interpretation of the disputed regulation during adjudication constituted the final agency action in this case, and accordingly, that opinion is owed deference by the reviewing Court. This Court, therefore, should resoundingly affirm the Tenth Circuit's opinion.

ARGUMENT

DEFERENCE MUST BE GIVEN TO THE COMMISSION'S INTERPRETATION OF AMBIGUOUS REGULATIONS IN ORDER TO EFFECTUATE THE LEGISLATURE'S INTENT IN CREATING AN INDEPENDENT ADJUDICATORY BODY UNDER THE ACT

The Act represents a major legislative milestone in government's effort to deal with the problems of injuries and illnesses arising out of employment and places of employment. The problems have existed since at least as early as the industrial revolution. During the nineteenth century the legal system essentially treated workplace injuries and illnesses under the law of torts. When it became evident that tort-based remedies did little to reduce the problems, legislative bodies generally adopted workmen's compensation laws in the hope that the economic disincentives of mandatory insurance premiums would induce employers to lower injury and illness incidences. Bokat & Thompson, *Occupational Safety and Health Law*, Chapts. 1 & 25 (1988). In the late 1960's, however, Congress became concerned that state laws were not adequately addressing the problems. As a consequence, the Senate Labor Committee and the House Committee on Education and Labor both reported out similar occupational safety and health bills proposing safety and health standards legislation with the authority for administration being vested in the Secretary. Comm. Print. Senate Comm. on Labor and Pub. Welfare, *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. at 204 *et seq.* and at 893 *et seq.*[1]

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[1] Hereinafter referred to as "Legislative History."

Under the bills (S. 2193 and H.R. 16785) the Secretary was authorized to promulgate occupational safety and health standards using essentially informal rulemaking procedures of the kind authorized by the APA. *See, e.g., Legislative History* at 238-46. Both bills required that employers comply with safety and health standards. *Id.* at 238. The bills also authorized the Secretary to investigate for compliance, to issue citations and propose civil penalties for alleged violations of safety and health standards, and to hear employer contests of citations and proposed penalties.

This legislation produced "the most bitter labor-management political fight in years." *Id.* at 193 (individual views of Senator Javits). The Secretary of Labor was, in essence, viewed by the business community as the Government's spokesperson for employees and particularly the spokesperson for organized labor. There was grave concern that employers could not obtain a fair deal from the Secretary of Labor. The concern was so "bitter as to jeopardize seriously the prospects for enactment." *Id.* at 194.

As a consequence, the Administration introduced substitute bills through Congressmen Steiger and Sikes in the House (H.R. 19200) and Senator Dominick in the Senate (S. 4404). *See id.* at 193. These bills proposed that normal administrative law procedures and concepts be altered dramatically. The substitute bills would have required that the rulemaking authority be allocated to the National Occupational Safety and Health Board ("the Board"), an independent agency to be established within the executive branch of government. *See, e.g., id.* at 779-82 (Sec. 8, H.R. 19200). Under the substitute bills, the Board would have been authorized to promulgate safety and health standards using formal rulemaking procedures of the kind authorized by sections 556 and 557 of the APA. *See Legislative History* at 773, 780-81.

It was also proposed in the substitute bills that employer contests of citations and proposed civil penalties be heard by another and different independent agency located within the executive branch, the Occupational Safety and Health Review Commission. *See id.* at 787-95 (Sec. 11, H.R. 19200).

Under the Administration bills, the Secretary of Labor was authorized only to conduct compliance inspections, to issue citations for alleged violations of the Act, to propose civil penalties, and to prosecute citations and penalty proposals before the Commission. *See, e.g., id.* at 782-87, 790 (Secs. 9, 10 and 11B(a), H.R. 19200). The Secretary also was authorized to propose safety and health standards and amendments of standards to the Board. *See, e.g., id.* at 772-73.

The Steiger-Sikes substitute bill (H.R. 19200) prevailed in the House. *Id.* at 1112. The House of Representatives, therefore, approved the proposal to divide normal APA roles and procedures into three parts each of which would be administered by different and independent agencies within the Executive branch. In particular, approval by the House of an independent board to promulgate safety standards clearly indicates skepticism for the concept that the Secretary would act fairly as a rulemaker.

The United States Senate, however, did not adopt the Administration's substitute S. 4404 as offered by Senator Dominick. Instead, it accepted the compromise offered by Senator Javits. *See id.* at 194-95, 462-79. The compromise established the Commission as an independent agency to hear and determine employer contests while giving the Secretary authority to promulgate rules and to prosecute alleged violations.

This bifurcation of the administrative power was deliberately taken by the Congress and the Administration

to obtain acceptance by the business community for the new approaches the Act takes to abate workplace injuries and illnesses. The Secretary's position in this litigation will seriously undermine the compromise made at the time the Act was passed by Congress and became law. It would relegate the Commission to acting little more than as a specialized jury charged merely with fact finding according to the Secretary's instructions. The history of the Act demonstrates that Congress intended that the Commission play a significant role as an arbiter of disputes between the Secretary on the one hand and employers on the other hand. To permit the Secretary the authority to state what the law is to the Commission in an adjudication is to impermissibly allow her to assume the role Congress assigned to the Commission.

Because Congress chose the Commission as the adjudicating agency and because it is specially qualified and "intimately familiar through day-to-day adjudication" with the objectives of the Act, the choice between alternative interpretations of OSHA regulations is properly committed to it. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974); *Brennan v. Occupational Safety and Health Review Commission ("OSHRC") and Republic Creosote Co.*, 501 F.2d 1196, 1198-99 (7th Cir. 1974). As the courts of appeals which have affirmed the concept that the Commission's interpretation of ambiguous regulations is entitled to deference have noted, the Commission is comprised of experts in the field of occupational safety and health who are appointed by the President and confirmed by the Senate. *See* 29 U.S.C. § 661(a); *Republic Creosote Co.*, 501 F.2d at 1189-99; *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 646 (9th Cir. 1982); *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-01 (9th Cir. 1986).[2]

[2] That the Secretary's recommended interpretation of a regulation should not control the Commission's conclusion is supported by the fact that Congress has authorized the Secretary to petition for judicial review of adverse Commission rulings. 29 U.S.C. § 660(b). *See Brennan v. OSHRC*, 513 F.2d 713, 715 (8th Cir. 1975). A grant of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) deference on judicial review effectively nullifies two levels of Commission proceedings to the detriment and at the expense of the other litigants. Such a result clearly could not have been intended by Congress.

The importance of an independent adjudicatory panel in procuring the business community's acceptance of the Act cannot be minimized. Senator Javits, sponsor of the compromise legislation characterized the issue of an independent adjudicatory body as "the nut in the coconut . . . . This is what it is all about." *Legislative History* at 463-64. He stated that "despite the substantial agreement which exists as to the objective of this legislation, the most bitter labor-management political fight in years has erupted over the means to achieve that objective." *Id.* at 193.

While due process was protected whether judicial authority was lodged with the Secretary or an independent panel, Senator Javits approached the issue from a far more practical standpoint—how to inspire confidence in the community expected to obey the law.[3] *Id.* at 469. What the business community sought was a fair and unbiased forum in which they could challenge the Secretary's enforcement of the Act. This was not a matter of due process, general tradition or general procedure. Instead, it was "a matter of designing a particular remedy for a particularly difficult situation," *id.*, and the business community felt an "infinitely greater assurance with this kind of commission than with en-

[3] Employer acceptance of OSHA was essential for passage and critical to successful implementation of the Act. Employer acceptance of the Act and confidence in its adjudicatory mechanism make voluntary compliance with the Act's provisions more likely. Employer self-regulation is crucial because the Department of Labor simply lacks the resources to monitor OSHA compliance in all workplaces.

forcement by the Secretary of Labor." *Id.* at 463-64.[4] Senator Javits noted that an independent commission was favorable because if the Secretary were the prosecutor and judge, any decision in favor of the employer would be a repudiation of the Secretary's own employees. *Id.* at 195. An "autonomous an independent" commission, on the other hand, inspired greater confidence in business because it could find for or against the Secretary without any overriding concerns of agency loyalty. *Id.* at 462-63.

Congress intended the adjudicatory role under OSHA to encompass the "same authority as would be given to a judge." *Id.* at 466.[5] Commission supporters made it

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[4] Senator Holland, speaking in support of an independent commission, noted that the unique history of management-labor relations makes an adjudicatory commission more important than in other areas, such as agriculture, where rulemaking, enforcement and adjudicatory functions reside in the same agency. The labor context has always involved a certain degree of combativeness, making an independent judicial commission more necessary so as not to be regarded as too close to labor or too close to management. *Legislative History* at 474.

[5] The Commission's role is clearly distinguishable from the Mine Safety and Health Review Commission upon which the Secretary relies in support of her position. Unlike the Act, the legislative history of the Mine Act specifically states "it is the intention of the Committee . . . that the Secretary's interpretation of both law and regulations shall be given weight by both the Commission and the courts." *S. Rep. No. 181*, 95th Cong., 1st Sess. 49 (1977). Congress obviously intended the opposite result under the OSH Act, as it specifically created the Commission as an independent adjudicatory body. Had Congress intended the courts and Commission to defer to the Secretary, it could have so provided as it did in the Mine Act.

The Secretary's analogy to the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act is likewise inapposite. The Benefits Review Board holds an adjudicatory role *within* the Department of Labor and its members are selected solely by the Secretary without the advice or consent of the Senate. 33 U.S.C. § 921(b). In creating the Commission, however, Congress

clear in the legislative debates that "judicial temperament" is what the President and Senate should seek in appointing and confirming members of the Commission. *Id.* at 475. In fact, in proceedings contesting a citation, the Legislature specified that the judicial function includes adjudicating, "among other things, the *validity of the standard, rule, order, or regulation* alleged to have been violated and the reasonableness of the time permitted for the correction of the violation." *Id.* at 854.[6] This is the judiciary's traditional role.

The ability to interpret and apply the law is part and parcel of any true judicial body and, as stated by Senator Javits, the Commission is to act with a full complement of judicial power—as both *judge* and *jury*. As a judge, the Commission must interpret the law at least to the extent necessary to perform its fact-finding role in deciding the enforcement action before it. Presidential appointment of Commission members with the advice and consent of the Senate, combined with their statutorily mandated experience and training, permits the Commission to perform both functions independently of the Secretary and Department of Labor. *See id.* at 466.

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was aware that the Secretary could create a board in the Department of Labor to hear appeals of citations and penalty proposals. *See Legislative History* at 195. It rejected that framework in favor of a completely independent adjudicatory Commission with significant expertise and adjudicatory power. If the Commission is analogous to the Benefits Review Board as the Secretary argues, then the legislative compromise that created the Commission was a sham.

[6] Although the House Committee Report involved the original version of the bill in which the Secretary was the adjudicator, the judicial function could not have been intended to be weaker if performed by an independent Commission. Thus, Congress must have intended to vest in the Commission the power to reasonably interpret an ambiguous regulation and to determine its validity, as the Commission did in this case.

If the Commission were not empowered to interpret the applicable law or regulations upon which a given citation is based, its role would be insignificant in the administrative framework of the Act. The Commission would be relegated to acting as an umpire calling balls and strikes on purely factual issues, a result directly contrary to congressional intent. The Commission in such circumstances would be trivial. Its role would be reduced to merely determining, e.g., whether a guardrail was 42 inches above a floor (29 C.F.R. § 1926.500(f)(1)) or whether personal protective equipment was needed to protect against an environmental hazard (29 C.F.R. § 1920.132). A role of this kind could have been fulfilled by a panel within the Department of Labor. *See Legislative History* at 195. Congress, however, created the Commission as an independent agency within the Executive branch and expected it to fulfill a more important role than that of an umpire.

Requiring judicial deference to the Secretary's interpretation of an ambiguous regulation in a case such as the present one not only frustrates the Legislature's intent in creating an independent adjudicatory body with full judicial power, but also has the practical effect of permitting "rulemaking" outside the prescribed statutory framework. While the Secretary argues in this case that hers must be the "true" interpretation of 29 C.F.R. § 1910.134, as incorporated in 29 C.F.R. § 1910.1029(g)(3), because she promulgated it, in reality, the regulation was ambiguous and had not been interpreted in this fashion prior to the time the Secretary instituted a prosecution in this case.[7]

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[7] Furthermore, the Secretary was not the author of 29 C.F.R. § 1910.134. It was one of the national consensus standards that Section 6(a) "required" the Secretary to promulgate within two years of the Act's effective date for the purpose of providing an immediate body of safety and health law. The Secretary's interpretation is less compelling when the regulation has been adopted from a consensus standard. *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 160 (3d Cir. 1978).

As rulemaker under the APA, the Secretary has multiple opportunities in notices of proposed rulemaking and in the preamble to her final rules to comment on and interpret the regulations she would promulgate. That is the proper time for the Secretary to express or clarify the intention of the regulation. However, when the Secretary fails to interpret an ambiguous regulation or to convey its purported meaning prior to enforcement, it is the power to adopt rules or policies in *adjudication* that becomes the central issue. *See Gilles & Cotting, Inc.*, 504 F.2d at 1262. It is the Commission and not the Secretary that is charged with the final adjudication of enforcement cases under the Act, and it is the Commission's determinations that the Act authorizes the courts to review. 29 U.S.C. §§ 659, 660(a) (1988). The Commission being comprised of technical experts can be expected to give the Secretary's ambiguous regulations a fairer construction than the Secretary might in fulfilling her role as a prosecutor. This is the "nut in the coconut" intended by the compromise which Senator Javits introduced. The Secretary, if dissatisfied with the Commission's interpretations, is not without remedies. The Secretary can appeal those decisions. Moreover, the Secretary always has her rulemaking authority available to exercise if she believes a safety and health standard requires amendment.

The present case illustrates the procedure followed in typical enforcement cases under the Act and highlights why the issue of deference is so critical to employers. This case does not involve the Secretary "pronouncing" the meaning of 29 C.F.R. § 1910.134 or § 1910.1029(g)(3). Instead, it arises out of a compliance officer's belief that CF&I Steel violated the regulations according to the *officer's* interpretation of them. The employer's only re-

course from the enforcement officer's position is to challenge it before a Commission administrative law judge ("ALJ"). The Department of Labor assigns a regional solicitor to prosecute the case and that lawyer generally adopts the compliance officer's opinion wholesale. By the ALJ stage, and certainly if further review is sought before the entire Commission, the enforcement officer's interpretation turned litigation position acquires an aura of official sanction by the Secretary—without her *ever* having been directly involved or issuing a formal regulatory interpretation.[8]

Clearly, the Commission or judiciary need not defer to representations or interpretations made by an OSHA compliance officer. *See L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C. Cir. 1982). However, that is the practical effect of deference to the Secretary's prosecutorial position in a case such as this. Moreover, judicial interpretation has emphasized that the Secretary's prosecutorial power is to remain separate and distinct from the adjudicatory power vested in the Commission. *See, e.g., Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam) (dismissing citation is within the Secretary's prosecutorial prerogative and, as such, is beyond Commission review.)[9] Similarly,

[8] The Secretary's interpretative positions taken for litigation purposes are not always consistent. The Sixth Circuit noted in a recent decision that the Secretary's interpretation of a regulation in litigation before it was contrary to the position she asserted in a prior case. *See Cleveland Electrical Illuminating Co. v. OSHRC*, —— F.2d ——, 14 O.S.H. Cas. (BNA) 1729, 1731 (6th Cir. 1990).

[9] Although an independent Commission forces a strict separation of powers under OSHA, due process under any regulatory scheme requires separation of powers even where they are distributed within the same agency. Those in charge of investigation or prosecution must be separated from those engaged in adjudication. If deference is automatically given to the prosecutorial body's interpretation of an ambiguous regulation, as the Secretary argues in this case, the judicial entity is relegated to acting as an arm of the prosecutor, quashing due process, or, at a minimum, fairness, in the process.

this Court has recognized that judicial deference is not owed to agency interpretations formed only during litigation. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

The Tenth Circuit's deference to the Commission realizes Congress' intent in creating an independent commission with full adjudicatory powers and corresponds with established law on judicial deference to agency actions. Accordingly, its ruling should be affirmed.

CONCLUSION

For all of the foregoing reasons, Amici Curiae respectfully urge this Court to affirm the decision of the Tenth Circuit in this case. The Tenth Circuit properly gave deference to the Commission's reasonable interpretation of an ambiguous regulation over the Secretary's prosecutorial interpretation of the same regulation.

Respectfully submitted,

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September 19, 1990

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BEST AVAILABLE COPY

No. 89-1641

In The
Supreme Court of the United States
October Term, 1990

Elizabeth H. Dole, Secretary of Labor,
United States Department of Labor,
Petitioner,

v.

Occupational Safety and Health
Review Commission

and

CF&I Steel Corporation,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

and

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to the instructions of the Clerk of the Court, the Occupational Safety and Health Review Commission (Commission) respectfully moves for leave to file the attached brief amicus curiae in support of the Respondents. The Solicitor General has authorized and consented to the filing of this brief, and Respondent CF&I Steel Corporation has also consented to its filing. These consent letters have been filed with the Clerk. However, because the Solicitor General has limited his authorization to the filing of an amicus brief (even though the Commission is named as a Respondent in the proceeding), the Clerk has instructed the Commission to move for leave to file the attached brief.

The Commission was created by the Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 651-678. The OSH Act delegates to the Commission the responsibility for all administrative adjudications under the statute. In fulfilling these responsibilities, the Commission often is called upon to interpret both the OSH Act and the regulations promulgated by the Secretary of Labor (to whom rulemaking responsibility is delegated). These interpretations often determine the outcome of proceedings before the Commission. The Commission thus has a vital and recurring institutional interest in the proper resolution of the question presented—to wit, whether its orders are controlling on the courts when the Secretary disagrees with the Commission's reasonable interpretation of an ambiguous regulation.

Because of the Commission's institutional interest in the case and experience with the administrative scheme of the OSH Act, it believes that its views would be helpful to the Court in resolving the question presented. Accordingly, the Commission respectfully moves for leave to file the attached brief amicus curiae in support of Respondents.

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September 1990

QUESTION PRESENTED

Whether an order of the Occupational Safety and Health Review Commission adopting a permissible interpretation of an ambiguous regulation that implements the Occupational Safety and Health Act is controlling on the courts when the Secretary of Labor disagrees with the Commission's interpretation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

and

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

The interest of the amicus is set forth in the motion accompanying this brief.

STATEMENT

1. In the Occupational Safety and Health Act of 1970 (Act or OSH Act), Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 651-678, Congress attempted "to assure so far as possible [that] every working man and woman in the Nation [has] safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). To achieve this goal, Congress among other things "authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards[,] . . . and . . . creat[ed] an Occupational

Safety and Health Review Commission for carrying out adjudicatory functions." *Id.* § 651(b)(3). The Occupational Safety and Health Review Commission (Commission) is an administrative body established by the Act that is composed of three members appointed by the President, with the advice and consent of the Senate, who possess the "training, education, or experience" necessary "to carry out the functions of the Commission." *Id.* § 661(a).

With regard to the establishment of safety and health standards under the Act, Congress provided that the Secretary must promptly by "rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless [she] determine[d] that the promulgation of such a standard would not result in improved safety or health for specifically designated employees." 29 U.S.C. § 655(a). Congress further provided that, in the event of "conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees." *Id.* Congress, however, also established elaborate procedures—involving use of advisory committees, notice and comment requirements, hearings, and delays in effective dates—that the Secretary must follow in promulgating, modifying, or revoking any such safety or health standard. *Id.* § 655(b). Finally, it provided that any person adversely affected by any such safety or health standard could directly challenge the legality of that standard in an appropriate court of appeals. *Id.* § 655(f).

With regard to the implementation of promulgated safety and health standards, Congress provided the Secretary with certain enumerated enforcement powers. *See* 29 U.S.C. §§ 657-659. Among other things, it authorized the Secretary to enter, inspect, and investigate places of employment for compliance with such safety and health standards. *Id.* at § 657(a). Congress further provided that, if upon inspection or investigation, "the Secretary or his authorized representative believes that an employer

has violated" any such standard, she may issue a citation which describes with particularity the nature of the alleged violation, sets a reasonable time period for abatement of the violation, and, depending upon the circumstances, proposes a civil penalty (ranging from zero to $10,000 per violation). *Id.* §§ 657-658, 666(a)-(c). Congress also provided, however, that such a citation is enforceable only as a final "order" of the Commission, and that the authority actually to assess a civil penalty lies exclusively with the Commission. *Id.* §§ 659(a), 666(j).

Specifically, an uncontested citation is by statute "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a), (b). Where a citation is contested (by either an employer, an employee, or a representative of an employee or group of employees), the Commission must hold a hearing in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. *See* 29 U.S.C. § 659(c). "At [the] hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty." *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 446 (1977). The Commission must "thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . . ." 29 U.S.C. § 659(c).[1]

Any private party "adversely affected or aggrieved by an order of the Commission" may petition for review of that order in an appropriate court of appeals. 29 U.S.C. § 660(a). The Secretary also may petition for judicial "review or enforcement of any final order of the Commission." *Id.* § 660(b). The Act generally limits judicial review to objections that were "urged before the Commission," and specifically provides that the Commis-

[1] Prior to the issuance of any such order, the Secretary retains her traditional prosecutorial discretion to withdraw a citation. *See Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (per curiam).

sion's factual findings, "if supported by substantial evidence on the record considered as a whole, shall be conclusive." *Id.* § 660(a). Concomitantly, the Commission's ruling on questions of law, pursuant to the interstitial provisions of the APA, must be sustained unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

2. In 1976, the Secretary adopted a standard regulating exposure to coke oven emissions. *See* 41 Fed. Reg. 46,742-90 (1976); 29 C.F.R. § 1910.1029. Subsection (g) of this standard concerns the provision and use of respirators, which are considered a permissible means of reducing exposure to coke oven emissions in certain circumstances. *See* 29 C.F.R. § 1010.1029(g). Among other things, subsection (g) requires the employer to "assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." *Id.* § 1910.1029(g)(4)(i). It also requires the employer to "institute a respiratory program in accordance with [29 C.F.R.] § 1910.134." 29 C.F.R. § 1910.1029(g)(3).

The standard at 29 C.F.R. § 1910.134, which was adopted by the Secretary without resort to "notice and comment" rulemaking pursuant to the provisions of 29 U.S.C. § 655(a), is the general industry standard for respiratory protection. 36 Fed. Reg. 10,466 (1971). It was not created by the Secretary, but instead was developed by the American National Standards Institute (ANSI), a private standards-setting organization, and is based on the ANSI standard designated Z88.2-1969, Standard Practice for Respiratory Protection. 36 Fed. Reg. 10,593 (1971); 29 C.F.R. § 1910.139. The general respiratory protection standard provides in relevant part:

> For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

29 C.F.R. § 1910.134(e)(5).

3. In August 1979, a compliance officer from the Occupational Safety and Health Administration (OSHA), an office within the Department of Labor to which the Secretary has delegated many of her OSH Act responsibilities, conducted a follow-up inspection of a Pueblo, Colorado coke oven facility of CF&I Steel Corporation (CF&I) to assess whether the coke oven emissions standard was being followed there. Pet. App. 19a. The compliance officer found that, before they were assigned to a regulated area, CF&I employeees were given respirators, told when to use them, and shown how to perform a "positive/negative pressure test"—*i.e.*, how to place the respirators on their faces and to check for leaks by inhaling and exhaling. *Id.* at 37a-38a. The compliance officer also found that employees were shown a film illustrating the proper use and fit of a respirator, and given another test in which they were exposed to a noxious chemical, isoamyl acetate (or "banana oil"), in a contained environment to determine if they detected the odor despite wearing a respirator. *Id.* at 38a. Finally, he found that workers who did detect the odor were not given replacement respirators, but were instead allowed to work with the same respirators in areas where exposure to coke oven emissions was possible. *Id.* at 38a-39a.

Based on these findings, the Secretary, through her compliance officer, cited CF&I for a "willful violation" of the coke oven emissions standard and proposed that a $10,000 penalty be assessed by the Commission. Pet. App. 3a, 43a. In doing so, however, the Secretary only cited CF&I for a violation of 29 C.F.R. § 1910.1029(g)(3) and the general standard on respiratory protection incorporated therein (*i.e.*, 29 C.F.R. § 1910.134). Pet. App. 43a-44a. The Secretary purposefully did not cite CF&I for a violation of 29 C.F.R. § 1910.1029(g)(4)(i), which

directly requires employers to "assure that the respirator issued to an employee . . . is fitted properly," because her compliance officer believed, albeit incorrectly, that an OSHA policy directive had suspended enforcement of that provision in light of an adverse court of appeals' decision. Pet. App. 43a-44a & n.13. Although CF&I pointed out the error, the Secretary chose not to move to amend the citation. *Id.* at 43a-44a, 45a n.15.

4. When CF&I contested the citation, an administrative law judge of the Commission held a hearing on the matter and recommended that the citation be affirmed. Pet. App. 57a-61a, 76a-82a, 90a. On review, however, the Commission determined that 29 C.F.R. § 1910.1029(g)(4)(i) "is specifically applicable to the cited condition and should have been cited by the Secretary instead of section 1910.1029(g)(3)." Pet. App. 40a. It further determined—based on the language of the regulations in issue, the source standard from which the incorporated regulation (*i.e.*, 29 C.F.R. § 1910.134) was derived, and the inconsistency of OSHA compliance instructions concerning this issue—that 29 C.F.R. § 1910.1029(g)(3), through the incorporation of 29 C.F.R. § 1910.134(e)(5), is a "training standard" and does not require "the employer to assure proper fit of an employee's respirator." Pet. App. 40a-43a. Finally, the Commission determined that CF&I's training program satisfied the requirements of the incorporated standard, 29 C.F.R. 1910.134(e)(5). Pet. App. 43a-45a. Accordingly, the Commission concluded that the Secretary had failed to prove a violation of 29 C.F.R. § 1910.1029(g)(3) and ordered that the citation be vacated. Pet. App. 45a.[2]

5. On petition by the Secretary for review of the Commission's order, the court of appeals affirmed. Pet. App.

[2] One Commissioner dissented. Pet. App. 51a-54a. While this Commissioner did not "take serious issue" with the conclusion that 29 C.F.R. § 1910.134 is a "training standard," he believed that the requirements of that standard had not been satisfied; in his view, the employees who detected banana oil "certainly were not trained in the use of respirators." Pet. App. 52a.

1a-11a. It found itself facing two competing interpretations: the Secretary supported the compliance officer's construction of § 1910.1029(g)(3) as a testing standard for proper respirator fit, while the Commission construed it as a training standard. Pet. App. 4a. For the court, the question became: "to whom is deference owed?" *Id.*

In answering this question, the court determined that, although both the Commission and the Secretary have administrative roles under the Act, the statutory text is "unclear" concerning who has "final interpretive authority over OSHA regulations." Pet. App. 5a-6a. The court found in the legislative history, however, a clear indication that "Congress sought to endow the Commission with the normal complement of adjudicative powers possessed by traditional administrative agencies" and that "[s]uch an adjudicative function necessarily encompasses the power to 'declare' the law." *Id.* at 7a. Accordingly, the court concluded that, "where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, . . . we will defer to [a reasonable] interpretation of the Commission." *Id.*

The court conceded (Pet. App. 7a) that several courts of appeals have reached a different conclusion due, in part, to a statement concerning the Benefits Review Board's interpretive authority under the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, that is contained in a footnote in *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (*Pepco*). The court below, however, considered the *Pepco* footnote to be "dicta," and refused to extend the conclusion of that footnote to the OSH Act setting. Pet. App. 7a-8a. The court additionally observed (*id.* at 8a) that administrative adjudication under the LHWCA is distinguishable in several significant ways from administrative adjudication under the OSH Act.[3]

[3] In particular, the court noted that LHWCA adjudications are nonaccusatory, with a private citizen acting as prosecutor. Pet. App. 8a. OSH Act adjudications, in contrast, are accusatory in nature. *Id.* Moreover, the agency acts as prosecutor in the OSH Act scheme,

Finally, the court determined that "it cannot be said that the Commission's interpretation of § 1910.1029(g)(3) in this case was unreasonable." Pet. App. 10a. The court found the structure of § 1910.1029(g)—requiring training through subsection (g)(3) and proper fit through subsection (g)(4), as well as § 1910.134's textual limitation to "training," to support the Commission's view. Pet. App. 10a. Although the court found possible support for the Secretary's view as well, it deemed itself obliged to defer to the Commission's view and advised the Secretary to "amend or clarify" her regulations if she continues to disagree. *Id.* at 11a.

SUMMARY OF ARGUMENT

A. This Court has long instructed that administrative interpretations of statutes and regulations are, in appropriate circumstances, entitled to deference from the courts. Where an agency has special expertise in a particular area, the Court has directed the courts to look to that agency's interpretations for guidance in resolving questions arising in that area. Where an agency has a delegation of lawmaking power in a particular area, the Court has instructed that the courts should give "controlling weight" to reasonable agency interpretations of ambiguous regulatory provisions in that area. Contrary to the Secretary's suggestion, however, the Court has not indicated that conferral of such lawmaking power on the agency is itself sufficient to bind the courts to the agency's interpretations; rather, the Court has indicated that, to bind the courts, the administrative interpretations must be in a form that Congress intended to have the force and effect of law.

B. In this case, the only administrative interpretation in a form that has the force and effect of law is the order of the Commission. The Commission's interpretation is based on both its special expertise and its delegated administrative adjudicatory powers; and it was expressed

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making the need for a separation of administrative functions "far more acute." *Id.*

in a formal, self-executing, legal order issued at the conclusion of a full adjudication of questions of law and fact. It is thus binding on the parties and the courts. By contrast, the Secretary's interpretation was expressed only in a citation issued by one of her compliance officers and in her lawyers' pleadings. An interpretation expressed in such unauthoritative forms does not establish a legally binding norm and thus is not entitled to "controlling weight" in the courts.

C. The Secretary's contrary argument rests on a misapplication of the allocation of administrative authority under the OSH Act. While Congress did delegate rulemaking and enforcement power to the Secretary, it expressly declined to give the Secretary the power to develop binding interpretations through the adjudicative process. Rather, it denied the Secretary adjudicative powers, and endowed the Commission with the full complement of such powers, including the power to declare the law; indeed, the legislative history shows that the Commission was modelled after the National Labor Relations Board and the Federal Trade Commission, two agencies which have long exercised policymaking authority through adjudication. Congress specifically required the Commission to have the technical expertise and experience in the field of job safety that the Secretary erroneously claims the Commission lacks, and it designated the Commission as the final authority with respect to legal and factual issues arising in the adjudicative process in order to reassure the regulated community that this process woud be a fair and efficient one. To accomplish Congress' objective, deference must be given to the Commission, not to the Secretary.

ARGUMENT

A COURT MUST DEFER TO A REASONABLE INTERPRETATION OF AN AMBIGUOUS OSH ACT REGULATION THAT IS EMBODIED IN AN ORDER OF THE COMMISSION EVEN THOUGH THE SECRETARY OF LABOR DISAGREES WITH THAT INTERPRETATION

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court reaffirmed that, where a governing statute or regulation is ambiguous, the courts must give controlling weight to a reasonable interpretation of that statute or regulation by an administrative agency charged with responsibility for filling in the interstices of that regulatory scheme. The Secretary apparently does not contend that the regulations at issue in this case are unambiguous or that the Commission's order rests on a wholly impermissible interpretation of them. *See* Pet. Br. 20-21 n.17, 37-38 n.37. Nevertheless, the Secretary contends that the court below erred in deferring to the Commission's views instead of her's. This contention is wrong.

A. An Administrative Interpretation Is Entitled To Controlling Weight Under *Chevron* Only When It Constitute An Authoritative Exercise Of Delegated Lawmaking Power By An Agency Charged With Filling In The Interstices Of A Regulatory Scheme

In arguing that the courts must give controlling weight to her views (and not to the Commission's views), the Secretary repeatedly asserts that her status as a "policymaker" under the OSH Act is some sort of talisman automatically triggering *Chevron*-style deference. *See* Pet. Br. 18-20, 22, 27, 29. This argument misunderstands *Chevron* and the administrative law principles underlying it.

1. This Court has long recognized that administrative interpretations of statutes and regulations are, in appropriate circumstances, entitled to deference from the courts. *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). The traditional justification for the courts doing so is that, in carrying out their functions, agencies typically develop expertise in regulated subject areas and have superior insights into the proper resolution of the polycentric problems that arise in those areas. *See International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979). As the Court made clear in *Chevron*, however, judicial deference can also be a product of the "legislative delegation to an agency." 467 U.S. at 844. Congress often explicitly or implicitly leaves "a gap for the agency to fill" and, "[i]n such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 844, 866.

When deference is prompted by such a legislative delegation, it has a different, and more significant, effect than does deference prompted by mere agency expertise. *Accord, General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). When judicial deference is prompted by mere agency expertise, agency interpretations are "not controlling upon the courts by reason of their authority[,] [but merely] . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. In contrast, when judicial deference is prompted by a legislative delegation, reasonable interpretations of ambiguous regulatory provisions may be entitled to "controlling weight"—*i.e.*, they may bind the courts to the agency's view. *Chevron*, 467 U.S. at 844, 865-66. *See also IRS v. FLRA*, 110 S. Ct. 1623, 1624 (1990).

2. Of course, while "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority," *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390 (1990), such a legislative delegation is only a necessary condition for *Chevron*-style deference; it is not by itself sufficient to bind the courts. Rather, this Court has indicated that the administrative interpretation being reviewed must also be in a form that Congress

intended to have the force and effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

a. As courts and commentators (such as the Administrative Conference of the United States) have recognized, there are sound reasons why "controlling weight" should be given only to administrative interpretations that are in a form which Congress intended to have the force and effect of law. *See* 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation 89-5). *See generally* Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 Yale J. on Reg. 1, 4-5, 30-36 (1990). Such a requirement ensures that an agency cannot bind the courts (or the public) without also binding itself. *See* Anthony, *supra*, 7 Yale J. on Reg. at 4-5; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-39 (D.C. Cir. 1986) (Scalia, J.). Moreover, such a requirement prevents an agency from evading the procedures that Congress has established for ensuring that administrative rules do not become legally enforceable without public or adversarial debate. *Accord, Morton v. Ruiz*, 415 U.S. 199, 230-36 (1974). And, finally, such a requirement provides assurance that binding legal rules will be established only by agency heads and other politically accountable officers—and not by lower-level officials or staff counsel. *See Heckler v. Chaney*, 470 U.S. 821, 836-37 n.5 (1985).

b. Occasionally, Congress will expressly specify which agency interpretations it intends to have the force and effect of law and thus be binding on the courts. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-44; *Fort Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980). In the absence of such an express specification, however, the APA provides the governing standards. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring). It distinguishes between administrative actions generally having the force and effect of law and those that do not. *See id.*

The APA identifies a fundamental dichotomy of administrative functions between "rule making" and "adjudication" and defines both by reference to their culminating event: " 'rule making' means agency process for formulating, amending, or repealing a rule," and " 'adjudication' means agency process for the formulation of an order." 5 U.S.C. §§ 551(5), (7). The "rules" and "orders" that result from these processes are defined terms under the APA [4] and, while they do not exhaust the forms of authoritative agency action under the APA, they constitute the bulk of them. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 216 (Scalia, J., concurring).

The primary distinction between a "rule" and an "order" is that, while an order "has future as well as past consequences, since the principles announced in adjudication cannot be departed from in future adjudications without reason," a rule "is a statement that has legal consequences only for the future." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 216 (Scalia, J., concurring). Ultimately, however, "rules" and "orders" have as their purpose the expression of governing legal standards —"[a]djudication deals with what the law was; rulemaking deals with what the law will be." *Id.* at 221 (Scalia, J., concurring). "Rules" and "orders" are thus the principal means by which agencies establish the kinds of binding legal norms that are eligible for *Chevron*-style deference. *Accord, Batterton v. Francis*, 432 U.S. at 425 & n.9. *See generally*, 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation 89-5); Anthony, *supra*, 7 Yale J. on Reg. at 4-5.

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[4] "Rule" is defined in relevant part as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .

5 U.S.C. § 551(4). "Order," in turn, is defined in relevant part as:

> the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . .

Id. § 551(6).

By contrast, under the APA, interpretive rules, mere statements of agency policy, manuals, guidelines, staff instructions, and agency litigation positions generally do not establish binding legal norms. *See Batterton v. Francis*, 432 U.S. at 425 n.9; *McKee v. Sullivan*, 903 F.2d 1436, 1438 n.3 (11th Cir. 1990); *Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987); *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Accordingly, they are not eligible for *Chevron*-style deference. *Accord, Batterton v. Francis*, 432 U.S. at 425 n.9; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 213. *See generally* 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation); Anthony, *supra*, 7 Yale. J. on Reg. at 55-61.

c. This Court's administrative law cases follow the basic approach of the APA to the *Chevron*-style deference issue. Interpretations developed through formal rulemaking procedures have been the paradigm candidates for *Chevron*-style deference. *See, e.g., Sullivan v. Everhart*, 110 S. Ct. 960, 963, 964-66 (1990). Less formal agency rules have also, in appropriate circumstances, received *Chevron*-style deference. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 978 (1986); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986). And, of course, final agency orders entered in the process of adjudication have been recognized as appropriate candidates for *Chevron*-style deference. *See, e.g., Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2046 (1990); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 114 (1985). But the Court has never applied the *Chevron*-deference principle "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Indeed, it has indicated that interpretive guidelines are not binding on the courts. *See Batterton v. Francis*, 432 U.S. at 425 n.9.

3. That mere statements of policy and litigation positions are not binding "rules" or "orders" (and thus not entitled to "controlling weight" under *Chevron*) does not mean that they are not entitled to any weight at all. *See Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988). It does mean, however, that the Commission and the "courts properly may accord less weight to such [interpretations] than to administrative regulations which Congress has declared shall have the force of law." *General Elec. Co. v. Gilbert*, 429 U.S. at 141. "'The weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .'" *Id.* at 142 (*quoting Skidmore*, 323 U.S. at 140). In no event, however, will the general rulemaking or enforcement authority of an agency give such non-binding statements of policy and procedure the power to control the courts. *Id.*; *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 204; *Batterton v. Francis*, 432 U.S. at 425 n.9.

4. Thus, the Secretary seriously errs in suggesting (Pet. Br. 18-20) that the deference issue here turns on Congress' conferral on her of so-called "policymaking" authority. Courts do not give agency interpretations *Chevron*-style deference simply because the agency has the capacity for exercising "policymaking" authority. Rather, courts give agency interpretations *Chevron*-style deference because, and only because, the interpretations constitute authoritative exercises of delegated lawmaking power. When the agency interpretations do not constitute such authoritative exercises of delegated lawmaking power, they do not receive *Chevron*-style deference.

B. Only The Commission Has Engaged In An Authoritative Exercise Of Delegated Lawmaking Power In This Case

The deference issue here thus turns not on which agency can make a greater claim to so-called "policymaking" authority, but which agency, if either, can

properly claim to have exercised delegated lawmaking authority. Only the Commission can properly claim to have done so here.

1. The Commission's interpretation of 29 C.F.R. § 1910.1029(g)(3) and, by incorporation, 29 U.S.C. § 1910.134(e)(5), constitutes an authoritative exercise of delegated lawmaking authority. The Commission developed its interpretation of these standards through its delegated administrative role of adjudication under the OSH Act. *See* 29 U.S.C. § 651(b)(3). It did so on the basis of the "training, education, or experience" that it is required by statute to have. *Id.* § 661(a). And it expressed its interpretation in a formal published order reached at the conclusion of a full administrative adjudication of questions of law and fact. *See id.* § 659(c). That order is self-executing and subject to reversal only by a court of appeals. *See id.* § 660. Such an "order" constitutes the kind of binding legal norm that routinely commands *Chevron*-style deference from the courts. *See, e.g., Fort Stewart Schools v. FLRA*, 110 S. Ct. at 2046; *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Thus, shortly after passage of the OSH Act, a panel of the Seventh Circuit, which included Justice (then-Judge) Stevens, stated:

> We note at the outset that the Occupational Safety and Health Review Commission is presumed to have technical expertise and experience in the field of job safety. A court must, therefore, defer to the findings and analysis of the Commission unless such findings are without substantial basis in fact . . . . The Act itself states: "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." . . . In addition, the Commission's interpretations regarding the meaning of the Act should be given substantial deference by a court.

Brennan v. OSHRC, 501 F.2d 1196, 1198-99 (7th Cir. 1974) (citations omitted).

2. By contrast, the Secretary's interpretive position is not embodied in any authoritative "rule" or "order."

The text of 29 C.F.R. § 1910.1029(g)(3) does not itself require fit testing of respirators in a test atmosphere. Moreover, 29 C.F.R. § 1910.134(e)(5) is on its face only a training standard. And the Secretary did not express her present interpretation of these standards in the preamble accompanying the proposed regulations, in the explanation issued with the final regulations, or in any post-promulgation rule. *See* 41 Fed. Reg. 46,742 (1976) (promulgation); 40 Fed. Reg. 32,286 (1975) (proposed regulation). Rather, the Secretary expressed her present view only in her compliance officer's citation of CF&I and in her solicitors' pleadings in support of that citation. These expressions of the Secretary's apparent interpretation are not sufficient to establish a legally binding norm.[5] Accordingly, they are not entitled to *Chevron*-style deference from the courts.[6]

3. Of course, as noted above (at 14-15) and in the decision below (Pet. App. 9a), the fact that the Secretary's interpretation is not eligible for *Chevron*-style deference does not mean that it is entitled to no weight

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[5] After the administrative hearing in this case was completed, OSHA issued an instruction to its compliance officers stating that they should begin requiring fit-testing of respirators in a test atmosphere. *See* OSHA Instruction CPL 2-2.29, *reprinted in* [1980-81 Transfer Binder] Employment Safety & Health Guide (CCH) ¶ 12,107. That instruction, which was not published in the Federal Register or in the Code of Federal Regulations, is nothing more than a discretionary enforcement guideline and thus, like the Secretary's litigation position in this case, does not establish the kind of binding legal norm that is entitled to *Chevron*-style deference from the courts. *See Batterton v. Francis*, 432 U.S. at 425 n.9; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 536-39.

[6] For this reason, contrary to the Secretary's suggestion (Pet. Br. 24), there is no anomaly in the fact that the Secretary may receive *Chevron*-style deference in cases where she has advanced in court an authoritative position that has the force and effect of law (and thus the power to bind). Such authoritative interpretations would effectively receive *Chevron*-deference even if initially presented to the Commission; if the Commission rejected an authoritative "rule" or "order" of the Secretary that is not contrary to the statute, the Commission's decision would not be "in accordance with law." 5 U.S.C. § 706(2)(A).

at all. On the contrary, the Commission should be, and is, hesitant to substitute its reading of a regulation for the reading of the Secretary; and, accordingly, the Commission will reject the Secretary's view only when it lacks the power to persuade (because, for example, it is not a product of thorough consideration, is inconsistent with a regulation's language, or is inconsistent with earlier pronouncements). *See Gardebring v. Jenkins*, 485 U.S. at 430; *Skidmore*, 323 U.S. at 140. Here, however, the Commission reasonably concluded that the Secretary's interpretation is not persuasive (because it is a product of a compliance officer's mistake, is inconsistent with the regulations' language and structure, and is inconsistent with prior OSHA statements). *See* Pet. App. 36a-45a. Under *Chevron*, the Commission's reasonable conclusion was properly accorded "controlling weight" by the court below.[7]

C. The Secretary Misapplies The Allocation Of Administrative Authority Under The OSH Act

In arguing to the contrary, the Secretary relies on a series of arguments concerning the allocation of administrative authority under the OSH Act. These arguments are seriously misguided.

1. The Secretary principally argues (Pet. Br. 20, 28-31) that, because Congress conferred all rulemaking and enforcement power on her, her interpreations of the OSH Act and its implementing regulations are entitled to "controlling weight"—even if developed in the course of a prosecution. As explained above (at 10-15), this argument conflicts with sound principles of administrative law

[7] The AFL-CIO thus errs in suggesting (AFL-CIO Br. 3-6, 12-13) that the decision below ignores the rule that a court should not substitute its judgment as to the meaning of a rule for that of the rule's maker. The question for the court below was not whether to substitute its view for that of the Secretary; that was the question which the Commission faced. The question for the court below was whether to substitute its judgment for that of the only legally binding agency position in the case—*i.e.*, the Commission's order. The court below properly did not do so.

(which indicate that *Chevron*-style deference should attach only to authoritative exercises of delegated legislative power by an agency, and not merely to its conferral on the agency). In any event, this argument is belied by the structure and legislative history of the OSH Act itself.

a. The OSH Act reflects a deliberate choice by Congress to divide administrative power between the Secretary and the Commission. The Secretary is delegated the task of developing "mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. § 651(b)(3). In addition, the Secretary is to conduct investigations and, if warranted, issue citations alleging a violation of the standards. *See id.* §§ 657-658. The Act establishes the Commission, however, as the ultimate administrative decisionmaker on any citation, *id.* § 659, and the Secretary has the burden of convincing the Commission that the elements of an alleged violation—legal and factual—have been established. *See id.*; *see also Atlas Roofing Co. v. OSHRC*, 430 U.S. at 446. The statutory structure thus indicates that the Secretary's prosecutorial positions are not entitled to *Chevron*-style deference; rather, only her rulemaking-related interpretations are judicially binding.

b. As explained in greater detail in the brief *amici curiae* of the Chamber of Commerce of the United States *et al.* (at 13-19), the legislative history confirms the limited nature of the congressional delegation to the Secretary. As originally developed by the responsible Senate and House committees, the OSH Act combined the rulemaking, prosecutorial, and adjudicatory functions in the Secretary. *See, e.g.*, S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970), *reprinted in* Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 148, 155 (Comm. Print 1971) (*Legis. Hist.*). A competing proposal, supported by the Administration, called for the

creation of two independent boards to perform the rulemaking and adjudicatory functions, leaving only prosecution with the Secretary. *See id.* at 54, *reprinted in Legis. Hist.* at 193 (individual views of Sen Javits). Proponents of the Administration bill saw their approach as analogous to other "multimember independent administrative agencies," such as "the National Labor Relations Board," whose performance of "quasi-judicial adjudication" was seen as a more positive experience than that resulting from concentration of all power in one Department. *Id.* at 55, *reprinted in Legis. Hist.* at 194 (individual views of Sen. Javits). Indeed, one of the main points of attack was that the Committee versions envisioned the Secretary "essentially acting as prosecutor and judge." *Id.* at 56, *reprinted in Legis. Hist.* at 195 (individual views of Sen. Javits).

Ultimately, the dispute spilled out onto the Senate floor. Senator Javits introduced a floor amendment to the Committee bill proposing to establish only one independent board, which would perform the adjudicatory function, and would possess "the same type of authority that the Federal Trade Commission exercises." *Legis. Hist.* at 462 (remarks of Sen. Javits). During the ensuing debate, Senator Javits defended his proposal in part by pointing to the National Labor Relations Board (NLRB) as precedent; in doing so, he noted that Congress had installed a General Counsel to act as an investigative and prosecutorial counterpart to the NLRB's "quasi-judicial functions" for "precisely the reason" that he was arguing for creation of an independent adjudicatory body under the OSH Act. *Legis. Hist.* at 477 (remarks of Sen. Javits). The Javits amendment passed by a 43-38 vote, and the structure that it established was adopted by the Conference Committee. *Legis. Hist.* at 1147 (remarks of Sen. Williams).

The legislative history thus confirms that the final administrative structure of the OSH Act represented a deliberate legislative compromise. While the Secretary

was given full rulemaking power, Congress also avoided conferring too much power on her. Instead, it imposed substantial procedural requirements on the exercise of her rulemaking powers; and, importantly, it generally declined to give the Secretary the power to develop binding interpretations through adjudication, thereby denying the Secretary a regulatory choice that most administrative agencies have. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).[8]

2. The Secretary also argues (Pet. Br. 21-24, 31-33) that Congress conferred no "policymaking" authority on the Commission and, accordingly, that its view cannot qualify for *Chevron*-style deference. Of course, as noted above (at 11-15, 16-17, 18-21), even if this argument were valid, it would not establish that the Secretary's views are entitled to judicial deference. In all events, the argument is unfounded.

a. As the court below noted (Pet. App. 7a), the OSH Act endows the Commission with the normal complement of adjudicative powers possessed by traditional administrative agencies. *See* 29 U.S.C. § 659(c), 661. The normal complement of adjudicative powers possessed by administrative agencies includes the power to "declare" the law—or, more specifically, to declare "what the law was." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring). And, as this Court has long recognized, the power administratively to declare "what

[8] The Secretary makes much of the Senate committee's belief that a sounder safety and health program would result if the responsibility for formulating rules was assigned to the same administrator who was responsible for those rules' enforcement. *See* Pet. Br. 30-31. But the Senate committee's belief simply shows that the Congress believed that better rules would result if these functions were combined. It does not show that Congress intended for the administrator who had these two functions to be able in administrative litigation to trump the Commission's interpretation of what ambiguous rules were intended to require.

the law was" includes a substantial policymaking component. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974); *SEC v. Chenery Corp.*, 332 U.S. at 202-03. Thus, there is every reason to conclude that "the Commission was designed to have a policy role" (*Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974)); indeed, as noted above (at 19-21), the legislative history of the OSH Act makes it clear that the Commission was modelled after the NLRB and the Federal Trade Commission, two agencies which have long been recognized to exercise policymaking authority through adjudication.

b. The Secretary plainly errs in suggesting (Pet. Br. 23-24) that the adjudicatory power to "declare" the law may serve as a vehicle for the formulation of policy only when the rulemaking power also resides in the agency. The adjudicatory and rulemaking powers are separate and independent administrative powers (and have, as their principle differences, only the immediacy of their consequences and the procedural requisites for their change). *See NLRB v. Bell Aerospace Co.*, 416 U.S. at 292-94; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring). Divesting an agency of one of these powers does not by itself diminish the agency's authority with respect to the other power.[9] It simply

[9] For example, in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, Congress divided the administrative functions of the old Civil Service Commission between two new agencies: The Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). S. Rep. No. 969, 95th Cong., 1st Sess. (1978) 4-5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2726-27. OPM was to have central responsibility for "personnel management," while the MSPB was designed to "adjudicate cases." *Id.* at 5-6, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2727-28; *see also* 5 U.S.C. § 1204(a)(1); 5 C.F.R. § 1200.1. The MSPB's members, like the Commission's, must have expertise and are appointed by the President with the advice and consent of the Senate. 5 U.S.C. § 1201. And, like the Commission, the MSPB has no substantive rulemaking authority. *See id.* §§ 1204(e)(2)(B), 1204(h). Yet, the courts of appeals, recognizing the MSPB's status as an "independent adjudicatory bod[y]," have granted the agency *Chevron*-style deference. *See, e.g., United States v. Paddack*, 825 F.2d 504, 513 (D.C. Cir. 1987). Indeed, this Court's decision in *Cornelius v. Nutt*, 472 U.S. 648, 659 (1985), was grounded in part on *Chevron*-style deference to the MSPB.

Similarly, the Board of Immigration Appeals (BIA) has been established by the Attorney General to "perform the quasi-judicial function of adjudicating cases" under the Immigration and Nationality Act. 8 C.F.R. § 3.1(a)(3). Despite a lack of any substantive rulemaking power, *id.* § 3.1(d)(3), the BIA's statutory and regulatory interpretations have often been accorded *Chevron*-style deference. Indeed, in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-49 & n.29 (1987), the Solicitor General argued that the BIA's construction of the Immigration and Nationality Act was entitled to controlling weight under *Chevron*, and the Court made clear that it believed such deference would have been due the BIA had the analysis progressed to that point in that case. The courts of appeals have routinely granted *Chevron*-style deference to the BIA. *See, e.g., Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990); *Campos-Guardado v. INS*, 809 F.2d 285, 289 (5th Cir.), *cert. denied*, 484 U.S. 826 (1987).

denies the agency the flexibility that derives from having both powers available to it.[10]

c. The Secretary and the AFL-CIO further err in suggesting (Pet. Br. 22 & n.19, 23 n.21, 33; AFL-CIO Br. 7-8, 12-14) that the Commission's role in this scheme is, at most, like that of a district court.[11] Unlike a dis-

[10] *See NLRB v. Bell Aerospace Co.*, 416 U.S. at 292-94 (describing flexibility); *SEC v. Chenery*, 332 U.S. at 202-03 (same); Shapiro, *supra*, 78 Harv. L. Rev. at 921 (same).

[11] The AFL-CIO goes so far as to suggest (AFL-CIO Br. 7-8) that the Commission is a mere "fact-finder" and has no role "in interpreting the law or the Secretary's standards." Even the Secretary does not make such an outlandish suggestion. *See* Pet. Br. 21-23 (conceding that, like a district court, Commission has power to make declarations of law). While the statute does state that the Commission's orders must be based on "findings of fact," it does not say that those orders may not include conclusions of law (which of course they may and do). *Accord, Brennan v. Gilles & Cotting, Inc.*, 504 F.2d at 1262; *Brennan v. OSHRC*, 492 F.2d 1027, 1032 (2d Cir. 1974). Indeed, by directing the Commission (29 U.S.C. § 659(c)) to conduct itself in accordance with the APA, the OSH

trict court, the Commission is part of the very administrative framework in which Congress vested the discretion for implementing the OSH Act. 29 U.S.C. § 651 (b)(3). Moreover, unlike a district court, the Commission is technically expert and experienced in the field of job safety and health. *Id.* § 661(a). Finally, unlike a district court, the Commission is composed of political appointees who are, at least indirectly, democratically accountable. *Id.* It is precisely these factors that led the Court in *Chevron* to hold that courts must give "controlling weight" to the authoritative judgments of administrative agencies like the Commission. *See Chevron*, 467 U.S. at 842-45, 864-66.

d. Finally, the Secretary errs in suggesting (Pet. Br. 31-33) that a rule requiring deference to the Secretary's interpretation (and not the Commission's interpretation) is consistent with the purposes for which the Commission was created. As explained in greater detail in the brief *amici curiae* of the Chamber of Commerce of the United States *et al.* (at 13-19), the legislative history shows that the regulated community viewed the Secretary as the "voice of labor" and that the Commission was created in order to reassure the regulated community that the adjudicatory process would be a fair and efficient one. Conferring *Chevron*-style deference on the Secretary's interpretation of an ambiguous regulation (and denying it to the Commission) would be directly inconsistent with this objective: It would confer on the very administrative official whom the regulated community feared vast discretion unfairly to bend the law to the facts of particular cases. And it would seriously cripple the administrative agency that was supposed to provide

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Act contemplates that the Commission will decide questions of law. *See* 5 U.S.C. § 557(c)(3)(A). Moreover, the statutory provisions authorizing the NLRB to issue unfair labor practice orders are almost identically worded to the OSH Act provisions that authorize "orders" by the Commission, *compare* 29 U.S.C. §§ 160(c), (e), (f) *with* 29 U.S.C. §§ 659(c), 660, and there is no plausible argument that the NLRB is a more "fact-finder."

the regulated community with an independent analysis of legal and factual claims under the OSH Act. As the Second Circuit has stated, the Commission's statutory role "'does not permit it to act as an umpire blandly calling balls and strikes for the adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.'" *Brennan v. OSHRC*, 492 F.2d at 1032.

3. The Secretary next suggests (Pet. Br. 24-27) that a number of "practical considerations" support deference to her interpretations. They do not do so.

a. The Secretary first suggests (Pet. Br. 25-26) that only she has a sufficiently broad perspective to interpret the meaning of the regulations that she has crafted. Of course, the Secretary did not even craft the regulation which, by incorporation, is in issue in this case.[12] In any event, the Commission is statutorily "presumed to have technical expertise and experience in the field of job safety." *Brennan v. OSHRC*, 501 F.2d at 1198. Moreover, "it is the Commission and not the Secretary which is charged with the final administrative adjudication of the Act." *Brennan v. OSHRC*, 513 F.2d 713, 715-16 (8th Cir. 1975). Indeed, while the Commission reviews only contested citations, every citation is deemed a final order of the Commission. 29 U.S.C. § 659(a). Thus, the Secretary's alleged vision with respect to the regulations cannot properly form the basis for judicial deference to her; Congress deemed the Commission to have this vision, and gave it the authority to resolve interpretive questions arising in the adjudicative process.[13]

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[12] As noted above (at 4-6), the substantive standard at issue is 29 C.F.R. 1910.134(e)(5), which is incorporated by and made applicable through 29 C.F.R. § 1910.1029(g)(3). The Secretary did not craft 29 C.F.R. § 1910.134(e)(5). It was part of a general respiratory protection standard developed by a private organization, ANSI, and later adopted by the Secretary pursuant to 29 U.S.C. § 655(a) without notice and comment procedures.

[13] In any event, the evidence that the Secretary cites does not support the conclusion that she reaches. While only a small portion

b. The Secretary next suggests (Pet. Br. 26-27) that a rule of deference to the Commission, rather than to the Secretary, would "undermine the stability of the OSH Act regime." But this precise rule of deference to the Commission has prevailed in a large number of judicial circuits, and there is no evidence that any such destabilization has occurred there. Nor is there any reasonable basis for believing that it would do so in the future: The Secretary remains free to resolve any ambiguity in a way that would bind the Commission—by engaging in rulemaking. Moreover, the Secretary remains free in the adjudicatory process to attempt to persuade the Commission that her interpretations of ambiguous rules are the most reasonable ones. And, in all events, as Professor (now-Deputy Solicitor General) Shapiro has noted, the Secretary has available to her "the many less formal alternatives that can constitute the beginning and end of the administrative process"—such as "the 'lifted eyebrow,' backed by a veiled or express threat of prosecution, . . . or of publicity, [which] can be an effective means of declaring and applying policy free from the restraints of judicial review." Shapiro, *supra*, 78 Harv. L. Rev. at 923. In short, the fears that the Secretary expresses here are incredible and, in the final analysis, simply constitute an objection to the congressional division of administrative authority under the OSH Act.

c. Finally, the Secretary makes the outrageous suggestion (Pet. Br. 27, 37) that a rule of deference to her is necessary in order to ensure that CF&I does not "escape liability." This suggestion shows absolutely no respect for either the rule of law or orderly procedure.

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of OSHA's overall activities lead to contested citations, the absolute number of such contested actions is still quite large—by the Secretary's own count, approximately 15,695 citations in fiscal year 1988 alone. Moreover, the cases in which legal issues are involved, and in which the deference issue is likely to be relevant, are just these contested cases; the uncontested citations are consensual resolutions that involve no significant issue about the scope of OSHA's standards and thus do little to enhance anyone's "vision of the program."

Moreover, it ignores the fact that CF&I would likely have been held in violation had the compliance officer cited it for a violation of the correct OSHA regulation, or had the Secretary's solicitors moved to amend the citation to do so. Indeed, CF&I is subject to the obligations contained in that regulation (29 C.F.R. § 1910.1029(g)(4)(i)), which remains in force. That the compliance officer and the Secretary's solicitors elected to make a "test case" out of CF&I's conduct is simply not a proper basis for deciding that the Secretary's prosecutorial interpretations should get judicial deference; indeed, it confirms that they should not.

4. The Secretary's final tack is to seize upon snippets from decisions involving different statutes and claim that such "analogous schemes" support deference to her (and not to the Commission) here. As explained in even greater detail in the brief *amici curiae* of the Chamber of Commerce of the United States *et al.* (at 24-27), this claim is also meritless.

a. The Secretary first argues (Pet. Br. 33-34) that this Court's conclusion in *Pepco*—that the Benefits Review Board is not a "policymaking" agency and thus is not entitled to special deference from the courts—is equally applicable to the Commission. But the statement in *Pepco* appears only in a footnote, and plainly constitutes *dicta* (since the Court in that case had already found the agency interpretation at issue to be at odds with the statutory scheme); indeed, as the Secretary concedes (Pet. Br. 34 n.33), at least two courts of appeals have declined to follow it. Moreover, there is clearly no basis for extending that *dicta* to this statutory scheme—which, in contrast to the LHWCA scheme, involves an independent agency established for the very purpose of dividing administrative authority.

b. The Secretary also argues (Pet. Br. 35-36) that the deference afforded to her interpretations under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, should be afforded to her interpretations under

the OSH Act. But, again, these are two different statutory schemes, and the Secretary does not even begin to justify her assertion that the intent of Congress under the OSH Act is the same as the intent of Congress under the Mine Act. In any event, as the Secretary concedes (Pet. Br. 36 n.35), courts have disagreed about the appropriate deference to be accorded to the interpretations of her and the Federal Mine Safety and Health Review Commission under the Mine Act; and the cases and legislative history that she cites are generally consistent with the argument advanced here—*i.e.*, that only administrative actions creating binding legal norms should have the "power to control," while administrative actions lacking such authority should have only the "power to persuade." [14]

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[14] *See Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1436-38 (D.C. Cir. 1989) (giving "controlling weight" to authoritative pronouncement of Secretary); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537-38 (taking Secretary's interpretation for its persuasive value); *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1136 (D.C. Cir. 1987) (rejecting Secretary's construction and affirming Mine Safety Commission); S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977) ("weight" shall be given to Secretary's interpretations).

The Secretary errs in repeatedly citing Justice (then-Judge) Scalia's opinion in *Cathedral Bluffs* as support for her position in this case. That opinion merely held that, in reviewing whether an enforcement policy of the Secretary is a "binding norm," a court owed no deference to the Mine Safety Commission, and a "not overwhelming" degree of deference to the Secretary. 796 F.2d at 537. Both conclusions appear correct to us (since neither the Mine Safety Commission nor the Secretary administers the APA, and since the guideline in issue concerned the Secretary's prosecutorial discretion). In any event, in reaching the former conclusion, the opinion was simply following prior circuit precedent; and, in reaching the latter conclusion, the opinion was merely recognizing that the Secretary's view of the legal effect of her own actions, while worthy of consideration, is not entitled to *Chevron*-style deference.

CONCLUSION

The judgment of the court below should be affirmed.[15]

Respectfully submitted,

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[15] The filing of this brief amicus curiae in support of the Respondents has been authorized by the Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

AND

CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INDUSTRY COUNCIL ON THE ENVIRONMENT, SAFETY, AND HEALTH, AND THE UNITED STATES HISPANIC CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an order of the Occupational Safety and Health Review Commission adopting a permissible interpretation of an ambiguous regulation that implements the Occupational Safety and Health Act of 1970 is controlling on the courts when the Secretary of Labor disagrees with the Commission's interpretation.

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INTEREST OF THE AMICI [1]

The Chamber of Commerce of the United States of America (Chamber), a nonprofit corporation organized and existing under the laws of the District of Columbia,

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[1] This brief amici curiae is filed with the consent of all parties. Letters acknowledging this consent have been filed with the Clerk of the Court.

is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The vast majority of its members are subject to the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651-678. The Chamber regularly represents the interests of its member-employers in important employment matters before the courts, the United States Congress, the Executive branch, and independent regulatory agencies of the Federal Government.[2]

The Industry Council on the Environment, Safety, and Health (ICESH) is an organization of companies formed to address compliance and enforcement issues arising out of government enforcement activities under federal occupational safety, health and environmental laws. At present, ICESH has twenty member companies representing the following industries: paper, hazardous waste handling and control, transportation, glass, basic minerals, chemical, petrochemical, petroleum, and consumer products. Such industries are covered by the OSH Act.

The United States Hispanic Chamber of Commerce (Hispanic Chamber), a nonprofit corporation organized and existing under the laws of the State of New Mexico, is the foremost national Hispanic business organization. It represents the interests of the nearly 400,000 Hispanic business enterprises operating in the United States, as well as state and local Hispanic chambers of commerce. The Hispanic Chamber regularly monitors legislative, regulatory, and judicial developments that affect Hispanic entrepreneurs.

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[2] The Chamber has sought to advance those interests in a wide spectrum of employment law litigation before this Court. *See, e.g., Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989); *Laborers' Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

The Chamber, ICESH, and the Hispanic Chamber have a significant interest in the question presented in this case. Their members frequently appear before the Occupational Safety and Health Review Commission (Commission) in challenges to the enforcement actions of the Secretary of Labor under the OSH Act. The ability of the Commission to function effectively as the OSH Act's adjudicator on issues of both fact and law is vitally important to the members of the Chamber, ICESH, and the Hispanic Chamber. Therefore, the Chamber, ICESH, and the Hispanic Chamber are seriously concerned that the balance of administrative power struck by Congress in the OSH Act be preserved.

Indeed, during congressional consideration of the bills which gave rise to the Occupational Safety and Health Act, the Chamber and other business groups supported passage of a substitute bill proposed by Senator Dominick. That bill laid the ground work for the establishment of the Commission by proposing both a standards board and an adjudicatory board. S. 4404, 91st Cong., 2d Sess. (1970), *reprinted in* Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 73 (Comm. Print 1971) (*Leg. Hist.*). The establishment of an independent agency was crucial to business support. As Walter J. Burke, the then-Secretary-Treasurer of the United Steelworkers of America, stated in opposition to the Dominick substitute:

> Last year a number of employer-oriented organizations and trade associations testified in opposition to the need for Federal occupational health and safety legislation. This year the field has been reversed. The one substantively new thing, which has been added, is the board.

Hearings on H.R. 13373 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st Sess. 927, 935-38 (1969), *quoted in* B.

Mintz, *OSHA: History, Law, and Policy* 23 (1984). While the Dominick bill was ultimately defeated, the concept of an independent review commission survived. *Amici* believe that, if the Secretary's position is accepted here, it will undo the legislative compromise that ultimately gained the support of the business community and allowed passage of the Occupational Safety and Health Act.

STATEMENT

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651-678, calls for adoption of a broad range of safety and health standards by the Secretary of Labor. In 1976, pursuant to this direction, the Secretary adopted a standard on exposure to coke oven emissions. 41 Fed. Reg. 46,742-90 (1976). The standard requires that employers limit their employees' exposure to coke oven emissions to a permissible level and specifies a number of techniques to be used to achieve this goal. *See* 29 C.F.R. §§ 1910.1029(c), (f). The standard also recognizes, however, that in some instances it will not be feasible to reduce emissions sufficiently, and calls for use of respirators to limit employee exposure in such circumstances. *Id.* § 1910.1029(g).

In 1979, a compliance officer from the Occupational Safety and Health Administration (OSHA), an office in the Department of Labor to which the Secretary has delegated most of her OSH Act responsibilities, inspected respondent CF&I Steel Corporation's (CF&I) coke oven facility in Pueblo, Colorado. The compliance officer issued a citation for an alleged violation of the respirator portion of the coke oven emissions standard. Specifically, the compliance officer found that 28 of CF&I's employees had been issued respirators that did not fit properly when worn in a "test atmosphere." The compliance officer concluded that this failure to ensure a proper fit violated 29 C.F.R. § 1910.134(e)(5), a general standard on respirators incorporated by reference into the coke oven emissions standard. *See id.* § 1910.1029(g)(3). Curiously, the compliance officer did not cite CF&I for a violation of subsection (g)(4) of the coke oven emissions standard, which provides:

> The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

Id. § 1910.1029(g)(4)(i). The compliance officer apparently chose not to rely on this subsection out of a mistaken belief that its enforcement had been suspended. Pet. App. 43a n.13.

Following the administrative procedures set out in the OSH Act, CF&I contested the citation before the Commission. An administrative law judge from the Commission affirmed, but on review the Commission vacated the citation. The Commission noted that the standard "make[s] a distinction between training in respirator use and assurance of proper respirator fit," regulating the former through subsection (g)(3) and the latter through subsection (g)(4)(i). *See* Pet. App. 41a. The Commission concluded that the Secretary had relied on the wrong portion of the standard in citing CF&I for violation of § 1910.1029(g)(3); and the Commission noted that the possible application of subsection (g)(4)(i) had been raised in the proceedings, and that the Secretary had chosen to defend the compliance officer's construction of subsection (g)(3) (and 29 C.F.R. § 1910.134(e)(5)) rather than move to amend the citation. Pet. App. 43a-44a & n.13.

The Secretary sought review of the Commission's decision in the United States Court of Appeals for the Tenth Circuit. *See* 29 U.S.C. § 660(b). Noting that the two agencies with administrative responsibilities under the OSH Act were taking opposing positions on the interpretive issue before it, the Tenth Circuit saw the question as "to whom is deference owed?" Pet. App. 4a. The Court concluded that the Commission was entitled to deference because it is assigned adjudicatory respon-

sibilities under the OSH Act and thus by statute has the final say on questions of law arising in adjudicatory proceedings. Pet. App. 5a-7a. Finally, the court found that the Commission's construction of § 1910.1029(g)(3) was reasonable and, accordingly, affirmed. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

A. Combining some or all of an agency's functions—particularly, the prosecutorial and adjudicatory functions—carries with it a recognized potential for unfairness. Congress generally has sought to alleviate this potential for unfairness by requiring that these functions be separated within an agency. On occasions, Congress has gone further by separating out responsibility for one of these functions and giving it to an independent agency. The OSH Act is such an occasion.

In the OSH Act, Congress has delegated exclusive authority for "adjudicative functions" to the Commission. Rulemaking and enforcement authority were conferred upon the Secretary, but each power was carefully limited by Congress. The Secretary must follow certain procedures in exercising the rulemaking power. In the enforcement process, Congress placed the burden on the Secretary to establish all elements of an alleged violation—factual and legal. Moreover, the Secretary's enforcement authority is subjugated to the Commission, which Congress has authorized to issue orders affirming, modifying, or revoking proposed citations. This delegation of adjudicative authority to the Commission belies any argument that Congress intended the courts to give "controlling weight" to the positions taken by the Secretary in litigation; on the contrary, it suggests that Congress intended the courts to give such deference to the Commission's decisions.

The legislative history confirms that Congress intended the Commission, and not the Secretary, to have the final say in the administrative process concerning the meaning of ambiguous OSH Act provisions and implementing

regulations. It shows that, in creating the Commission, Congress intended to limit the Secretary's prosecutorial power and to confer upon the Commission the full complement of adjudicative powers available to the National Labor Relations Board and the Federal Trade Commission, two agencies which have long been recognized to exercise policymaking authority through adjudication. It further shows that Congress created this split in administrative authority in order to address concerns in the regulated community that the Secretary was the "voice of labor"; stated differently, it did so in order to reassure the regulated community that alleged violations of the statute would be resolved independently and objectively. Giving deference to the Secretary rather than the Commission would deprive the regulated community of the reassurance of independence and objectivity that it was promised and thus unravel the political compromise struck by Congress.

B. The Secretary and the AFL-CIO seek to justify their attempt to undo the legislative compromise by reference to general principles of administrative law. But general principles of administrative law do not support their effort.

Contrary to their argument, the Secretary's status as a "policymaker" under the OSH Act does not require deference to the interpretations that she develops in the adjudicative process. This Court has never given "controlling weight" to agency litigation positions that are wholly unsupported by regulations, rulings, or administrative practice.

Their suggestion that the conferral of administrative adjudicatory authority on the Commission does not include a policymaking function also is incorrect. Under established principles of administrative law, the power of an administrative agency to adjudicate legal questions presumptively includes a substantial policymaking component. The legislative history of the OSH Act confirms that the Commission was intended to have such power.

The Secretary and the AFL-CIO similarly err in suggesting that the Secretary's role in promulgating the coke oven emissions standard requires that her interpretation be given "controlling weight" by the courts. The Secretary did not draft the relevant portion of this regulation. Moreover, involvement in the regulatory drafting process would at most establish the authority to reach an interpretive issue; it would not establish that that authority has been exercised in a form sufficient to have the force and effect of law.

Nor does the alleged expertise and experience that the Secretary has acquired in enforcing these regulations allow "controlling weight" to be given to her prosecutorial determinations. It is the Commission, not the Secretary, who is by statute deemed expert in these matters. Indeed, the Commission is just as involved as the Secretary in matters that are likely to raise the deference question—*i.e.*, contested cases. In any event, while expertise and experience may contribute to an agency's ability to persuade the courts, it does not properly contribute to its power to control the courts.

Finally, there is no basis for suggesting that a rule of deference to the Commission will undermine the stability of the OSH Act regime. A rule of deference to the Commission has thus far prevailed in a large number of circuits without any such consequences occurring; and the Secretary has ample means available to her for preventing any such destabilization from occurring. In all events, such policy arguments are more appropriately addressed to Congress.

C. The statutory analogues to which the Secretary points do not support her cause. The Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950, is a completely different statutory scheme, and conclusions about deference owing the Benefits Review Board under that regime obviously cannot be imported here. The Federal Mine Safety and Health Act

of 1977, 30 U.S.C. § 801 *et seq.*, is more like the OSH Act, but again differences in statutory language and purpose make any attempted analogy between the two schemes difficult at best. In all events, the case law under these two statutes does not clearly establish any kind of deference rules; thus, there are no clear statutory analogues that the Court can rely on in reaching its decision here.

ARGUMENT

The OSH Act, like many landmark statutes, reflects a compromise among several competing versions. The Act's administrative structure was a particular focus of congressional debate, and the final system installed by Congress represents a delicate balance of power between the two agencies charged with its administration: the Secretary and the Commission. The Secretary's position in this case seeks to upset that balance and to undo the compromise struck by Congress. Specifically, she seeks to arrogate to herself a decisionmaking authority—*i.e.*, the authority to resolve regulatory ambiguities in the adjudicatory process—that Congress expressly denied her and conferred instead on the Commission. In doing so, the Secretary ignores the OSH Act's structure and legislative history and, furthermore, misconceives the basis for judicial deference to administrative agencies.

A. Deference To The Commission's Interpretations Of Ambiguous Statutory And Regulatory Provisions Is An Essential Part Of The Compromise Developed By Congress In Enacting The OSH Act

1. Modern administrative agencies perform a variety of functions in carrying out the tasks assigned to them by Congress. Agencies formulate rules, inspect the regulated parties to monitor compliance with statutory obligations, investigate potential violations, prosecute alleged violations, and adjudicate alleged violations. Combining some or all of these roles—particularly, the prosecutorial and adjudicatory roles—in a single agency carries with

it a potential for unfairness. Congress generally has sought to alleviate this potential for unfairness by requiring that these functions be separated within a given agency. Thus, the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, the "embodiment" of "general principles of administrative law," generally requires that participants in the prosecutorial and adjudicatory functions in an agency be separated. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring); 5 U.S.C. § 554(d) (APA); 1 C.F.R. § 305.86-4 (Administrative Conference Recommendation 86-4).

With such an internal separation of functions in place, the concerns over unfair agency adjudications are eased somewhat. Yet, ultimately, functions that are informally separated "come together at the top in the person of the head . . . of the agency, who, through subordinates, [is] responsible for all three functions"—rule formulation, prosecution, and adjudication. 1 C.F.R. § 305.86-4 (Administrative Conference Recommendation 86-4). Thus, "internal separation of functions has never entirely silenced the critics who argue that it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency." *Id.* Such concerns over the fairness of administrative adjudication have led Congress on several occasions specially to separate one or more of these agency functions.

One prominent example is the General Counsel of the National Labor Relations Board (NLRB) and the NLRB itself. As the Court noted in *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 117-18 (1987), "[o]ne of the major goals" of the Labor-Management Relations Act (LMRA), 61 Stat. 136 (1947), was to "divide the old Board's prosecutorial and adjudicatory functions between two entities," the Board and the newly-created position of General Counsel of the Board. Congress determined that the General Counsel "should be

independent of the Board's supervision and review," and therefore installed him as the final authority on investigatory and prosecutorial matters. 484 U.S. at 118. The Board retained its role as the rulemaker and administrative adjudicator.

The OSH Act is another variant on this theme of separated powers. In the OSH Act, Congress granted general rulemaking powers to the Secretary. *See* 29 U.S.C. § 655. In addition, it authorized the Secretary to conduct investigations and, if warranted, issue citations alleging a violation of established standards or the general duty clause of the Act. *See id.* §§ 654, 657-658. It established the Commission, however, as the final administrative adjudicator on any citation. *See id.* § 659. The statutory scheme thus reflects a special concern on the part of Congress that the prosecutorial and adjudicative functions under the OSH Act should be completely separated.

2. The Secretary and the AFL-CIO argue (Pet. Br. 20-33; AFL-CIO Br. 6-15) that deference to interpretations developed by the Secretary in litigation is not only consistent with Congress' special concern for the separation of prosecutorial and adjudicatory functions under the OSH Act, but is in fact mandated by Congress' decision to confer rulemaking power on the Secretary. This argument is inconsistent with both the structure and legislative history of the OSH Act scheme.

a. In terms of statutory structure, the OSH Act quite clearly confers authority on the Commission—not on the Secretary—to resolve legal issues arising in the adjudicatory process. Moreover, while Congress conferred rulemaking power on the Secretary, it required that she exercise that power only pursuant to specified rulemaking procedures; and, in the adjudicatory process, Congress clearly intended for the Commission to be supreme.

The OSH Act delegates to the Commission exclusive authority for "adjudicative functions" under the statute.

29 U.S.C. § 651(b)(3). It requires the President to appoint to the Commission persons who have the "training, education, or experience" to fulfill these functions. *Id.* § 661(a). The Act also authorizes the Commission to issue orders, based on findings of fact, affirming, modifying, or revoking proposed citations. *Id.* § 659(c). The authority to issue such "orders" carries with it the authority to declare "what the law was." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921, 927 (1965). For this reason, courts have long concluded that "the Commission was designed to have a policy role" (*Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974)), and that "the Commission's interpretations . . . should be given substantial deference by a court." *Brennan v. OSHRC*, 501 F.2d 1196, 1198-99 (7th Cir. 1974).

Concomitantly, while the OSH Act confers rulemaking authority on the Secretary, it places special limitations on the exercise of that authority and subordinates the Secretary's authority in the enforcement process to that of the Commission. Specifically, the OSH Act requires the Secretary to follow elaborate procedures—involving use of advisory committees, notice and comment procedures, hearings, and delays in effective dates—in promulgating, modifying, or revoking any safety or health standard. 29 U.S.C. § 655(b). Moreover, although the OSH Act authorizes the Secretary to conduct inspections and issue citations, it places "the burden . . . on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty." *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 446 (1977). Indeed, the Act makes it clear that, with respect to contested citations, the Commission is fully authorized to affirm, vacate, or modify either the citations or the proposed penalties. 29 U.S.C. § 659. Furthermore, the Act provides that all citations, whether contested or not, become enforceable only as final "orders" of the Commission—orders that are self-executing after issuance by the Commission. *Id.* Thus, there is no basis for the suggestion that the conferral of rulemaking power on the Secretary indicates a congressional desire that deference should be given to the interpretations that the Secretary advances in the adjudicative process as well; on the contrary, the statutory structure indicates that Congress intended precisely the opposite result.

b. This conclusion is reinforced by examination of the legislative history. That history shows that the administrative structure of the OSH Act was the source of considerable debate in Congress, and it explains that the ultimate, formal separation of functions in the OSH Act was a deliberate compromise aimed at severely limiting the power of the Secretary in the adjudicative process.

As originally conceived by the Senate and House Committees responsible for developing the legislation, the OSH Act vested the Secretary with responsibility for rulemaking, prosecution, and adjudication. *See, e.g.*, S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970) (Senate Report), *reprinted in Leg. Hist.* at 148, 155. As the Secretary notes (Pet. Br. 28), this concentration of administrative power was favored by organized labor. *See Leg. Hist.* at 323 (statement of Sen. Saxbe). Business interests were wary, however, of placing sole responsibility for such a wide-ranging and intrusive legislative initiative in a single administrative actor, and thus supported the competing Administration bill.[3] The Administration's

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[3] The OSH Act was viewed by employers as groundbreaking legislation in many ways. In addition to establishing mandatory nationwide safety and health standards on a wide range of topics and subjecting employers to significant penalties for violations of those standards (29 U.S.C. §§ 655, 666), the Act vested the Secretary with broad inspection powers (*id.* § 657(a)), and subjected em-

proposal gave the Secretary only the prosecutorial function, and proposed creation of two independent boards to perform the rulemaking and adjudicatory functions. *See* Senate Report at 54 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 193.

The Committee debate over these competing administrative structures was substantial, and "bec[a]me so bitter as to jeopardize seriously the prospects for enactment" of the statute. *Id.* at 55 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 194. In the Senate, for example, the Committee on Labor and Public Welfare rejected the Administration's proposal by a 10-7 vote, concluding that placement of "the responsibility and accountability for administration of the total program in the Secretary" was preferable to "establish[ing] a new agency and creat[ing] an unnecessary division of responsibility." *Id.* at 15, *reprinted in Leg. Hist.* at 155. Moreover, the Committee majority pointed out that the APA would ensure an informal separation of functions within the Department of Labor. *Id.*

Four members of the Committee remained unconvinced, and repeatedly attacked the concentration of all administrative authority in the Secretary. *See, e.g., id.* at 56 (individual views of Sen Javits), *reprinted in Leg. Hist.* at 195. Senators Dominick and Smith noted that, under the Committee's structure, "[f]ew safeguards or restrictions [we]re to be placed on the authority of the Secretary." *Id.* at 62 (minority views of Sen. Dominick and Sen. Smith), *reprinted in Leg. Hist.* at 201. Without such restrictions on the Secretary's authority, they feared abuse of power:

> A single man is easier to harass than an independent standards board or quasi-judicial panel. With the concentration of power in the hands of one man, he will be subject to intense political pressure to act a particular way.

Id. The dissenting Senators also noted that, under the Committee's administrative structure, agency adjudication would not alleviate these concerns. To the contrary, they found the adjudication envisoned by the Committee proposal to lack "the procedural safeguards necessary for fair determination of rights, responsibilities, and obligations of all parties." *Id.*

The primary difficulty the dissenting Senators saw was that the only route for an employer to challenge a citation issued by the Secretary was "through an appeal . . . to the Secretary for relief." *Id.* As Senator Javits noted, "[a]ny finding by the Secretary in favor of [the employer] would be essentially a repudiation by the Secretary of [her] own Department's employees." *Id.* at 56 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 195. Forcing the Secretary to "essentially act[] as prosecutor and judge," with "one official of the Department (e.g., the Deputy Solicitor) . . . tak[ing] the position of prosecutor and another official (e.g., the Solicitor) . . . tak[ing] the position of a neutral in order to advise the Secretary," would, they believed, completely destroy any confidence that employers might have in the fairness of the proceedings. *Id.* Senators Dominick and Smith added that any perceived lack of fairness in the adjudicatory process would undermine Congress' desire to promote voluntary compliance with the Act. *See id.* at 62 (minority views of Sen. Dominick and Sen. Smith), *reprinted in Leg. Hist.* at 201.

Overall, the Committee minority continued to prefer the Administration's approach, arguing that the broad reach of the OSH Act warranted a formalized division of authority. *Id.* at 54 (individual views of Sen Javits), *reprinted in Leg. Hist.* at 193. Senator Javits, in particular, concluded that a separation of functions, while

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ployers to potentially burdensome recordkeeping requirements. *Id.* § 657(c); *see also Leg. Hist.* at 469 (statement of Sen. Javits) (noting "unbelievable ramifications of [OSH Act] and the reach of th[e] law into countless numbers of workplaces throughout the country").

not necessarily required by notions of due process, would enhance the confidence of all parties in the administrative adjudicatory process. *Id.* He used the NLRB as an example, and asserted that independent administrative agencies such as the NLRB had established a better record "in the area of quasi-judicial adjudication" than had agencies with power concentrated in "cabinet-level officials." *Id.* at 55 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 194.

The debate over administrative structure that began in the Committee continued on the Senate floor, where ultimately the minority views found a more receptive audience. Before the Senate had formally taken up the Committee's bill and report, Senator Saxbe began the debate by announcing that a substitute bill mirroring the Administration bill would be introduced by Senator Dominick. Senator Saxbe then submitted a statement in support of the substitute, noting that "[t]he difference between the bills lies not in their purpose but in the type of structure each sets up for achieving that purpose." *Leg. Hist.* at 298 (statement of Sen. Saxbe). The statement detailed the Committee minority's criticism of the majority's approach, arguing that "[t]he reported bill is, in a word, unfair":

> [A]ll the good that could be achieved through a bill's education, research and enforcement provisions should not be rendered ineffective by inevitable disillusionment with its unfair regulatory procedures. Unfair regulatory procedures will only alienate employers from State and Federal officials who ought to to be guiding employers toward compliance.

Id. In Senator Saxbe's view, the unfairness stemmed directly from the "simplistic approach of placing all functions in the Secretary of Labor," which he considered comparable "to having the Chief of Police, in addition to his regular duties of conducting inspections, also write the criminal laws and then act as judge and jury." *Id.*

The more preferable approach, Senator Saxbe continued to believe, was "refocus[ing] responsibility for job safety and health by distributing the regulatory functions." Thus, under the substitute bill, "the Secretary of Labor would be authorized to conduct inspections and investigations . . . [but] would not hear the case and pass judgment on the offender." That function would be delegated to the Commission, which would "conduct hearings on alleged violations discovered by the Secretary . . . [and] on the basis of its decision, issue any necessary corrective orders, as well as assess civil penalties." *Id.*

Full Senate debate opened with Senator Williams defending the Committee's choice of administrative structure. *Id.* at 414 (statement of Sen. Williams). He argued that the Administration's approach "would result in such diffusion of responsibility and accountability as to seriously undermine the effectiveness of th[e] program." *Id.* at 417 (statement of Sen. Williams). Supporters of a separation-of-powers approach countered that "[t]he enormous amount of power given to the Secretary of Labor [by the Committee version] could easily be abused, culminating in a breakdown of existing Government neutrality in labor-management relations." *Id.* at 448 (statement of Sen. Tower). Indeed, the conflict on this issue ran so deep that Senator Dominick's substitute bill, which would have reinstated the administrative structure of the Administration's original proposal, was defeated by only a narrow, 41-39, margin. *Id.* at 449.

The next day, Senator Javits proposed a compromise. He abandoned his prior insistence on two independent boards to set standards and adjudicate violations, and called instead for a single independent entity to serve as the agency adjudicator. *Id.* at 462 (statement of Sen. Javits). Senator Williams immediately opposed the Javits proposal, arguing that, due to the APA's provisions, "there is no real or basic difference in the enforce-

ment procedures that would be followed under the committee bill and those provided for in the pending amendment." *Id.* at 466 (statement of Sen. Williams). For Senator Javits and those supporting his amendment, however, the informal separation of the APA was not enough; they believed that an independent adjudicative authority was necessary to enhance public confidence and to serve as an autonomous check on the prosecutorial power of the Secretary. *Id.* at 470 (statement of Sen. Javits); *id.* at 472 (statement of Sen. Dominick); *id.* at 473 (statement of Sen. Holland).

Senator Javits pointed out that the administrative structure that he proposed would mirror the relationship between the NLRB and its General Counsel: the Commission would perform the same "quasi-judicial functions" as the NLRB, and the Secretary would perform the prosecutorial functions given to the Board's independent General Counsel. *Id.* at 477 (statement of Sen. Javits). Senator Javits also analogized the role of the Commission to that of the Federal Trade Commission, suggesting that the Commission would have "the same type of authority that the Federal Trade Commission exercises. . . ." *Id.* at 462 (statement of Sen. Javits). The Javits amendment passed, 43-38, and was retained in the final version of the bill. *Id.* at 1147 (statement of Sen. Williams).

In short, the legislative history confirms that Congress intended that the Commission, not the Secretary, would have the final say in the administrative process concerning the meaning of ambiguous OSH Act provisions and implementing regulations. It shows that, while Congress conferred broad rulemaking powers upon the Secretary, it intended that the Secretary could exercise those powers only through the rulemaking process. Moreover, it shows that, in creating the Commission, Congress intended to limit the Secretary's prosecutorial power and to confer upon the Commission the full complement of adjudicative powers available to the NLRB and the Federal Trade

Commission, two agencies that have long been recognized to exercise policymaking authority through adjudication. *See Shapiro, supra*, 78 Harv. L. Rev. at 927-29. Congress did so in order effectively to reassure the regulated community that the adjudicatory process would be a fair and efficient one.

Given the deep concerns over separation of powers expressed throughout the congressional debates, it is incredible to suggest, as the Secretary does, that her prosecutorial constructions of ambiguous regulations are entitled to *Chevron*-style deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The administrative structure of the OSH Act was the "key issue" that "polarized labor and management" during Congress' deliberations. Senate Report at 54 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 193. There was great concern "on the part of employers . . . [and] in the mind of the average citizen, that the Labor Department always . . . is most sympathetic in its attitude toward the labor organizations." *Leg. Hist.* at 476 (statement of Sen. Holland). For these reasons, Congress installed "an agency that will be respected and is capable, impartial, and objective in its approach." *Id.* Accepting the Secretary's position would prevent the Commission from fulfilling this role and would unravel the political compromise struck by Congress; indeed, it would allow the Secretary to act as prosecutor and judge, and it would deprive the Commission of the authority necessary for it independently and effectively to resolve the legal and factual questions presented to it. There is simply no statutory basis for taking these steps.

B. The Secretary And The AFL-CIO Misapply General Principles Of Administrative Law

The Secretary and the AFL-CIO attempt to justify their effort to unravel the legislative compromise struck in the OSH Act by reference to general principles of ad-

ministrative law. *See* Pet. Br. 18-20; AFL-CIO Br. 3-6. But the general principles of administrative law that they cite do not support their effort.

First, contrary to the Secretary's suggestion (Pet. Br. 18-20), her status as a "policymaker" under the OSH Act does not require the courts to give "controlling weight" to the interpretations that she develops in the adjudicative (*i.e.*, prosecutorial) process. As this Court noted in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212, the deference principles of *Chevron* "have never [been] applied . . . to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *See also Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971). On the contrary, the deference principles of *Chevron* have been applied only to agency interpretations that are in a form that Congress intended to have the force and effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). *See generally* 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation 89-5); Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 Yale J. on Reg. 1, 4-5, 30-36 (1990). There is no basis for suggesting that Congress intended citations issued by the Secretary (or pleadings filed in support of those citations) to create such legally binding norms.

Second, the Commission's function as the administrative adjudicator under the OSH Act in fact includes a policymaking function. As the Secretary concedes (Pet. Br. 20-22), the adjudicatory function of the Commission necessarily encompasses the power to make declarations of law.[4] When this power is placed in an administrative

[4] The AFL-CIO plainly errs in suggesting (AFL-CIO Br. 7-8) that the Commission's adjudicatory function is simply that of a fact-finder. The statute authorizes the Commission to issue "orders" and assess penalties, as well as to find facts, and that authorization presumptively, if not necessarily, includes the power to declare the law. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d at 1262; *Brennan v. OSHRC*, 492 F.2d 1027, 1032 (2d Cir. 1974). *See generally Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 216, 221 (Scalia, J., concurring). Indeed, the Commission's statutory authorization is essentially identical to that of the NLRB (*compare* 29 U.S.C. §§ 659(c), 660 *with* 29 U.S.C. §§ 160(c), (e)), and there is no plausible argument that the NLRB is a mere "fact-finder."

agency, it implicitly encompasses a substantial policymaking component. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC. v. Chenery Corp.*, 332 U.S. at 202-03; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J. concurring). Indeed, as noted above (at 16, 18-19), the legislative history of the OSH Act makes clear that the Commission's adjudicatory powers were conceived by Congress as a mirror-image of the adjudicatory powers of the NLRB and the FTC, two agencies that have long been recognized to exercise policymaking authority through adjudication.[5]

Third, contrary to the suggestion of both the Secretary and the AFL-CIO (Pet. Br. 20-21 n.17, 25; AFL-CIO Br. 3-6, 12-13), the Secretary's role in promulgating the coke oven emissions standard does not require that her interpretation of those regulations be given "controlling weight" by the courts. To begin with, the Secretary did not draft the relevant section of those regulations,[6] and

[5] The attempt of the Secretary and the AFL-CIO (Pet. Br. 22-24; AFL-CIO Br. 7-8) to equate the Commission's law-declaration powers with the law-declaration powers of a district court is unfounded. The Commission, unlike a district court, is part of the administrative framework in which Congress vested the discretion for implementing the OSH Act. Moreover, the Commission, unlike a district court, reports to the President and thus, at least indirectly, is democratically accountable. Finally, the Commission, unlike a district court, is required to have expertise in the field of occupational safety and health. 29 U.S.C. § 661(a).

[6] The relevant provision, 29 C.F.R. § 1910.134(e)(5), which is incorporated by reference into the coke oven emissions standard, is a so-called "national consensus standard." It was drafted by the American National Standards Institute and adopted by the Secretary pursuant to the requirements of 29 U.S.C. § 655(a). *See* Pet. App. 42a.

she therefore cannot properly claim any special insights into its original meaning.[7] Moreover, although the Secretary's involvement in the promulgation of the regulation establishes that she has a delegation of congressional authority wide enough to reach this interpretive issue, it does not establish that she has actually exercised that authority in a form sufficient to have the force and effect of law; on the contrary, as noted above (at 20), her means of expression on this issue—*i.e.*, her citation of CF&I, and her solicitor's pleadings—plainly fail to do so. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Finally, even if the author of a regulation is ordinarily entitled to say what it means, the OSH Act clearly denies the Secretary the authority to do so in the adjudicative process (because, under this statute, the Commission has the final say on questions of law and fact at issue in that process).[8]

Fourth, the expertise and experience that the Secretary has acquired in enforcing these regulations similarly does not, as the Secretary and the AFL-CIO suggest (Pet. Br. 25-26; AFL-CIO Br. 13-14 & n.10), justify giving "con-

[7] The Secretary misses the mark in suggesting (Pet. Br. 25 n.23) that her role in adopting the standard is a "policy" determination worthy of deference in its own right. The underlying interpretive question here is not whether adoption of the standard would "result in improved safety or health," the determination to be made by the Secretary under 29 U.S.C. § 655(a), but whether the language of the regulation (that she did not draft) was intended by its drafters to require fit testing in a test atmosphere.

[8] Of course, the Secretary's views are still entitled to weight. *See Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). But the Commission reasonably rejected the Secretary's interpretation—because it is a product of a compliance officer's mistake, is inconsistent with the structure of the regulations in issue, and is inconsistent with prior positions of OSHA. *See* Pet. App. 41a-44a & n.14. Thus, the court below had to give "controlling weight" to the Commission's interpretation—because it is reasonable, within the delegated authority of the Commission, and in a form intended by Congress to have legal effect.

trolling weight" to her prosecutorial interpretations. For one thing, it is the Commission, not the Secretary, who is by statute deemed expert and experienced with respect to these matters. *See* 29 U.S.C. § 661(a). For another, while the Commission reviews only contested citations, the absolute number of such contested citations is quite large; and, as a practical matter, it is only these contested citations that involve issues sufficiently substantial to provide any "vision" about the OSH Act program as a whole. In all events, expertise and experience are not the sole basis for *Chevron*-style deference from the courts; while expertise and experience contribute to the ability of an agency to persuade the courts, they do not properly contribute to the power of an agency to control the courts. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976); *Skidmore v. Swift & Co.*, 323 U.S. at 140.

Finally, there is no basis for the Secretary's suggestion (Pet. Br. 26-27) that a rule of deference to the Secretary, rather than to the Commission, is necessary to prevent "the stability of the OSH Act regime" from being undermined. A rule of deference to the Commission, rather than the Secretary, has prevailed in a large number of the courts of appeals, and the Secretary offers no evidence that compliance efforts have been unduly impaired in those judicial circuits. Indeed, there is no reasonable basis for believing that any such impairment has or will occur: the Secretary has an inherent advantage in the prosecutorial process (since she can pressure employers to settle merely by the threat of penalties and adverse publicity), and she is always free to clarify or amend her regulations through the rulemaking process. *See* Shapiro, *supra*, 78 Harv. L. Rev. at 923. In any event, the administrative law and statutory principles establishing the rule of deference to the Commission (and not to the Secretary) are "so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than to one

whose authority is limited to interpreting it." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. at 551.

C. The Statutory Analogues To Which The Secretary Points Do Not Support Her Cause

Finally, the Secretary points to "analogous statutory schemes" and argues (Pet. Br. 33-36) that they inform interpretation of the OSH Act's administrative structure. This contention is incorrect.

1. The Secretary first points (Pet. Br. 33-34) to the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, and this Court's decision concerning the LHWCA in *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) (*Pepco*). But neither *Pepco* nor the LHWCA supports the Secretary's position here.

In *Pepco*, the Court ruled that, under the plain language of the Act, a partially disabled individual's compensation award was limited to a statutory schedule and could not be increased through use of a more generous formula applicable to non-scheduled injuries. 449 U.S. at 273-74. In a footnote, the Court dismissed the Benefits Review Board's (BRB) contrary conclusion, and commented that the Board "is not a policymaking agency" and thus is entitled to no special deference. *Id.* at 278 n.18. This statement, however, plainly constitutes *dicta*; the Court already had found the statutory language unambiguous, which was the "end of the matter." *Chevron*, 467 U.S. at 842. The *Pepco* footnote thus cannot carry authoritative weight here.[9]

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[9] Indeed, the Secretary's effort to rely on *Pepco*'s statement is undercut by her own admission (Pet. Br. at 34 n.33) that at least two courts of appeals have declined to follow it. Surely the Court should resolve the split in judicial authority under the LHWCA before considering the extension of any LHWCA-based conclusion to this separate statutory scheme.

In any event, there is no basis for importing *Pepco*'s comments on the BRB's role under the LHWCA into the vastly different OSH Act scheme. The BRB is appointed by the Secretary and exercises adjudicatory authority only "as delegated by the Secretary." 33 U.S.C. § 921 (b)(1). Moreover, proceedings before the BRB do not seek to identify violations of a regulatory command or impose a penalty, and the Secretary does not appear before the BRB in a prosecutorial role; rather, the BRB serves to review compensation orders issued by Deputy Commissioners appointed by the Secretary to review disability or death claims filed by private parties. *Id.* §§ 919, 940. The Commission, by contrast, is established as an independent agency outside the Department of Labor, and the individual Commissioners are appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 661. In addition, proceedings before the Commission involve violations of statutory and regulatory commands, and may result in imposition of substantial penalties. *Id.* §§ 654(a)(2), 666. The Secretary appears before the Commission in a prosecutorial capacity, thus triggering a greater concern with separation of functions, *see, e.g.*, 5 U.S.C. § 554(d), a concern reflected throughout the OSH Act's legislative history. *See, e.g.*, Senate Report at 56 (individual views of Sen. Javits), *reprinted in Leg. Hist.* at 195; *Leg. Hist.* at 298 (statement of Sen. Saxbe). In short, the Secretary is mixing apples and oranges in analogizing the deference issue under the OSH Act to the deference issue under the LHWCA.

2. The Secretary next looks (Pet. Br. 35-36) to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801 *et seq.*, to support her deference argument. But the Mine Act does not do so.

To begin with, while the administrative structures of the Mine Act and the OSH Act have much in common, there are also important differences. The statutory language creating and empowering the Commission and the

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Federal Mine Safety and Health Review Commission (FMSHRC) is not the same. *Compare* 29 U.S.C. §§ 659-661 *with* 30 U.S.C. §§ 815, 823. Nor are the delegations of authority to the Secretary under the two statutes the same. *Compare* 29 U.S.C. §§ 654-658 *with* 30 U.S.C. §§ 811, 813-816. Moreover, as this Court held in *Donovan v. Dewey*, 452 U.S. 594, 600-03 & n.7 (1981), the OSH Act and the Mine Act are distinct in their scope and purposes. Thus, there is every reason to doubt that conclusions about deference under one of these statutes can automatically be imported into the other.

In any event, the cases do not establish that the Secretary's prosecutorial interpretations are in fact given "controlling weight" under the Mine Act. On the contrary, much as the lower courts have reached conflicting decisions in evaluating the OSH Act's allocation of administrative authority, they have developed a checkered pattern in evaluating the respective roles of the Secretary and the FMSHRC under the Mine Act. For example, in *Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988), the court found FMSHRC's interpretation to be entitled to *Chevron*-style deference, although it noted that the degree of deference is "diminished . . . when the Secretary of Labor favors an interpretation at odds with that adopted by the Commission." Moreover, in *Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1436-38 (D.C. Cir. 1989), the court merely granted deference to an authoritative pronouncement of the Secretary; while, in *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1136 (D.C. Cir. 1987), the court rejected the Secretary's construction and affirmed the FMSHRC. Finally, in *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J.), the court did not give the Secretary's views the type of controlling weight that she seeks here; instead, Justice (then-Judge) Scalia observed that "there is deference and there is deference—and the deference accorded to the agency on a point such as this is not overwhelming." *Id.* at 537. And, in evaluating the

administrative structure of the Mine Act, Justice Scalia was simply adhering to prior circuit precedence—specifically, *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984), where the court granted deference to the Secretary because it had before it "just the sort of determination the Secretary was empowered by Congress to make." That is not the case here.

CONCLUSION

The judgment of the court below should be affirmed.

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OCTOBER TERM, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 3401	4, 6
MISCELLANEOUS:	
Tax Court Rule 142, 26 U.S.C. foll. § 7453	6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
v.
OCCUPATIONAL SAFETY AND HEALTH REVIEW
COMMISSION and CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Iron and Steel Institute ("AISI") respectfully files this brief as *amicus curiae* in support of Respondents. Written consents have been obtained from counsel for Petitioner and Respondents pursuant to Supreme Court Rule 37.3. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICUS CURIAE*

The American Iron and Steel Institute is a national trade association whose 40 domestic member companies account for approximately 80 percent of the raw steel production of the United States. The issue presented by

this case is relevant to issues commonly encountered by AISI's member companies. AISI's member companies have a strong interest in the interpretation and enforcement of regulations governing coke production, such as those at issue in this case, because coke production is important to the manufacture of iron and steel. AISI was a party to the development of and the initial challenge to the coke oven emissions standards that were the basis of the citation issued by Petitioner the Secretary of Labor (the "Secretary") to Respondent CF&I Steel Corporation. *See American Iron and Steel Inst. v. Occupational Safety and Health Admin.*, 577 F.2d 825 (3d Cir. 1978).

SUMMARY OF ARGUMENT

Properly formulated, the question facing this Court is whether the United States Court of Appeals for the Tenth Circuit utilized the appropriate standard of review in its review of the decision of the Occupational Safety and Health Review Commission (the "Commission"). The answer to that question is yes.

The Commission is an autonomous independent adjudicatory board that is neither subordinate to the Secretary nor obligated to defer to the Secretary's interpretation of her regulations under the Occupational Safety and Health Act. The Commission is, therefore, fundamentally different from any of the boards created by Congress under other statutory schemes that the Solicitor General claims to be analogous.

Moreover, the independence the Commission enjoys from the Secretary was a conscious legislative choice to break a political deadlock that existed between labor and management over passage of the Occupational Safety and Health Act. The Commission's role in the statutory scheme is far more substantial than a mere finder of fact as the Secretary would have it. This Court should not destroy the political balance struck by Congress; rather, it should enforce the legislative compromise.

Congress intended that the decisions of the Commission be reviewed under the narrow "arbitrary and capricious" standard of the Administrative Procedure Act. Consistent with this standard, the Tenth Circuit properly held that the Commission's decision was reasonable.

The Tenth Circuit also appropriately deferred to the specialized expertise of the Commission in matters of occupational safety and health. The Commission is due the same level of deferential review granted to other specialized tribunals, such as the United States Tax Court.

Finally, since the Commission only decided that the Secretary had charged Respondent under the improper regulatory provision and not that no violation had occurred, upholding the Tenth Circuit would not, as the Solicitor General suggests, sanction the activity which brought about the charge in the first place.

ARGUMENT

UNDER THE APPROPRIATE STANDARD OF REVIEW, THE TENTH CIRCUIT PROPERLY UPHELD THE COMMISSION'S DECISION

Petitioner's arguments can be distilled into a simple syllogism: The Secretary is the policy-making authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"); the Commission has only adjudicatory authority. When the policymaker disagrees with an adjudicatory body over the interpretation of a regulation, the policymaker's interpretation must prevail. Therefore, in this case the Secretary's interpretation is entitled to judicial deference, and the Tenth Circuit erred in according deference to the Commission's interpretation. Petitioner's reasoning is simple enough, but

it does not accurately portray existing law [1] nor properly state the issue before this Court.[2]

The proper issue is the appropriate standard of review to be used by a court of appeals reviewing a decision of an independent, specialized adjudicatory tribunal—in this case, the Commission. In deciding that question, this

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[1] *Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs* ("*Pepco*"), 449 U.S. 268 (1980), relied on by the Solicitor General, does not support the broad proposition for which the Solictor General cites it. *Pepco*, and the cases cited therein, involved appeals from a nonindependent adjudicatory tribunal that is fundamentally different in makeup from the Commission. Other cases supporting deference to the policymaker relied on by the Solicitor General involved direct appeals from an agency or department to a court. Different issues are involved when the statute has interposed an autonomous expert tribunal between the policymaker and the courts.

[2] Implicit in Petitioner's formulation of the question presented is the assertion that, where the Secretary and Commission disagree, the proper role of the Court is to review directly the reasonableness of the Secretary's actions. Such a position flatly contradicts the plain language of the OSH Act, which provides that persons, including the Secretary, may obtain review only of a "final order of the Commission." 29 U.S.C. § 660(a), (b). In other words, at issue is not the Secretary's view but the Commission's decision. Were it otherwise, the Commission would be only a fact-finding body with authority similar to an administrative law judge. There is nothing in the legislative history to support this result, even though it is inherent in the Solicitor General's formulation of the issue.

The Federal Mine Safety and Health Act of 1977, upon which Petitioner relies, is unlike the OSH Act in this regard because its legislative history explicitly provides that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and *the courts*." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 3401, 3448 (emphasis added). This admonition suggests that the Secretary's actions under the Federal Mine Safety and Health Act may be directly reviewed by courts; there is no similar suggestion in the OSH Act.

Court should consider the makeup of the adjudicatory body, any specific direction given that body by Congress, and the role of the adjudicatory body in the overall statutory scheme.

A. The Commission Is An Autonomous Adjudicative Tribunal That Is Neither Subordinate to the Secretary Nor Obligated to Defer to the Secretary's Interpretation of Her Regulations

Central to Petitioner's argument is the assertion that in cases of conflict between adjudicatory bodies and policymakers, courts must always defer to policymakers. Petitioner seems to equate all specialized adjudicatory bodies. She fails to recognize that substantial differences exist between nonindependent adjudicatory tribunals bound to and responsible to an agency head and specialized adjudicatory tribunals that exercise authority independent of agency influence.

In the case of nonindependent tribunals, the scope of judicial review is clear. To pick an example raised by Petitioner, the Longshore and Harbor Workers' Compensation Act (the "LHWC Act") establishes a Benefits Review Board ("Benefits Review Board") which is composed of members who are appointed by the Secretary for no fixed term and who serve at her pleasure. 33 U.S.C. § 921(b); *Kalaris v. Donovan*, 697 F.2d 376, 397 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). The Benefits Review Board has no authority to promulgate any internal rules, to order deposition testimony, or to subpoena records and has no investigatory or contempt power. *See* 33 U.S.C. § 921 (establishing authority of Benefits Review Board). Thus, the Benefits Review Board is but an appendage of the Secretary. Indeed, it has been characterized as a quasi-judicial body of "lesser dignity." *Kalaris*, 697 F.2d at 396 n.82. The decisions of tribunals such as the Benefits Review Board are therefore properly accorded no special deference by the courts.

Saginaw Mining Co. v. Mazzulli, 818 F.2d 1278, 1283 (6th Cir. 1987); *see also Director, Office of Workers' Compensation Programs v. General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990).

In contrast, the Commission is composed of members who are appointed by the President, with the advice and consent of the Senate, for a fixed term and are removable by the President only "for inefficiency, neglect of duty, or malfeasance in office." 29 U.S.C. § 661(a), (b). Unlike the Benefits Review Board, the Commission is authorized to promulgate its own internal rules, to order deposition testimony, and to subpoena records, and has certain investigatory and contempt powers. *Compare* 29 U.S.C. § 661(g)-(i) *with* 33 U.S.C. § 921. Thus, in its makeup and authority, the Commission is more like the United States Tax Court ("Tax Court"), the Federal Mine Safety and Health Review Commission ("Mine Safety Commission"), and other specialized independent tribuals that play a significant policy role apart from individual departmental or agency heads. *See* 26 U.S.C. § 7443(b), (e), (f); 30 U.S.C. § 823(a), (b).

However, unlike either the Mine Safety Commission or the Tax Court, which have been instructed by Congress to defer to the head of the administrative agency whose decision they are reviewing,[3] the Commission is, in the words of its sponsor, Senator Javits, "an autonomous, independent commission which, without regard to

[3] In the legislative history of the Federal Mine Safety and Health Act, Congress unambiguously stated that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 3401, 3448. Under the Internal Revenue Code, the taxpayer has the burden of proving the invalidity of the Internal Revenue Service Commissioner's determination of tax deficiency, which is presumptively correct. Tax Court Rule 142, 26 U.S.C. foll. § 7453 (1989). *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Merryman v. Commissioner*, 873 F.2d 879, 882 (5th Cir. 1989).

the Secretary, can find for or against him on the basis of individual complaints." *See Legislative History of the Occupational Safety and Health Act of 1970*, Senate Committee on Labor and Public Welfare (1971) ("Legislative History") at 463.[4]

In contrast, nothing in the OSH Act or its legislative history suggests that the Commission is to accord deference to the Secretary or treat the Secretary's actions as presumptively correct. Indeed, as courts have held under the OSH Act, the Secretary has the burden of proving all elements of an alleged OSH Act violation, which suggests that the Commission owes no deference to the Secretary. *See, e.g., B&B Insulation, Inc. v. Occupational Safety and Health Review Comm'n*, 583 F.2d 1364, 1372 (5th Cir. 1978); *Brennan v. Occupational Safety and Health Review Comm'n*, 511 F.2d 1139, 1143 (9th Cir. 1975).[5]

[4] *See also* Legislative History at 462 (Commission is "[a]utonomous and independent" and "is expressly set forth to be an independent commission") (statement of Sen. Javits); *id.* at 463 (Commission "would not be a Labor Department instrument") (statement of Sen. Javits); *id.* at 473 ("an independent enforcement agency . . . will be much more acceptable to employers, and . . . in the long run to employees" than a system under which the Secretary has adjudicatory authority) (statement of Sen. Holland); *id.* at 1143 (Commission is "an independent adjudicatory body") (letter from J.H. Hodgson, Secretary of Labor, to Sen. Javits (Dec. 15, 1970)).

[5] Although the Commission's rules of procedure were amended in 1986 to eliminate the specific regulatory provision placing the burden of proof on the Secretary, the Commission stated that "Commission case law on burdens of proof is in no way affected by the deletion of present § 2200.73 . . . parties . . . may continue to be guided by that case law." 51 Fed. Reg. 32,002, 32,013 (1986).

The Secretary did not argue in her appeal to the Tenth Circuit that the Commission erred in not deferring to her interpretation nor has the Solicitor General pressed that argument before this Court. The Secretary has focused only on the deference owed her by the courts, not the deference, if any, owed her by the Commission. This position contrasts with the position taken in cases relied on by the Solicitor General involving the Benefits Review Board in which courts have held that the Board did not give defer-

B. The Tenth Circuit's Scope of Review Was Properly Limited to Determining the Reasonableness of the Commission's Interpretation

The OSH Act does not set forth the standard of judicial review of Commission decisions. Given the absence of any specific congressional direction, AISI believes that the Commission's final decision should be subject to the standard of review of final agency action governed by the Administrative Procedure Act ("APA").[6] 5 U.S.C. § 706. That was the standard the Commission's sponsor stated would govern Commission decisions. According to Senator Javits, "[t]he Administratice Procedure Act applies anyway, whether the Secretary is the enforcing agent or the Commission is the enforcing agent." Legislative History at 463. Under the APA standard, courts must uphold agency action unless it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Numerous appellate courts have subscribed to precisely this standard in reviewing Commission decisions. *E.g., Fluor Constructors, Inc. v. Occupational Safety and Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988); *accord Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000 (9th Cir. 1986); *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 324-25 (8th Cir. 1981); *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126, 130 (10th Cir. 1978); *see also Marshall v. Western Elec. Inc.*, 565 F.2d 240, 244 (2d Cir. 1977) (reviewing court's "role 'is to decide whether the Commission's interpretation of the regulation is unreasonable and inconsistent with its purpose, the normal standard for review of the interpretation of a regulation by the agency charged with its administration'") (*quoting Brennan v. Occupational Safety and Health Review Comm'n*, 491 F.2d 1340, 1344 (2d Cir. 1974)).[7] By definition, the "arbitrary and capricious" standard of review is a narrow one, and the reviewing court may consider only whether the Commission's decision was based on a consideration of all relevant factors and whether the Commission made a clear error of judgment. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

The Tenth Circuit properly limited its review to examining whether the Commission's interpretation of the coke oven respiratory regulation was reasonable. Pet. App. 9a-11a.[8] Circumscribed as it was by the narrow scope of review mandated by the APA, the Tenth Circuit was correct to limit its inquiry to the reasonableness of the Commission's interpretation without ruling on the reasonableness of the Secretary's interpretation, to which the Commission is not obligated to defer.[9]

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ence to the Secretary as required by the legislative history of the LHWC Act. *See Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432 (D.C. Cir. 1989); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986).

[6] Another possible standard, raised in passing by the First Circuit, would be *de novo* review with "the court mak[ing] up its mind independently about the rule's meaning," *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 63 (1st Cir. 1985). Neither the First Circuit, nor any other court, has seriously considered such a course of action, which would overturn generally accepted principles of administrative law. *See, e.g., Federal Labor Relations Auth. v. U.S. Dep't of the Treasury*, 884 F.2d 1446, 1454 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 863 (1990); *Acadian Gas Pipeline Sys. v. Federal Energy Regulatory Comm'n*, 878 F.2d 865, 868 (5th Cir. 1989).

[7] In *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909 (7th Cir. 1987); *United Steelworkers v. Schuylkill Metals Corp.*, 828 F.2d 314 (5th Cir. 1987); and *Brock v. Williams Enterprises of Ga., Inc.*, 832 F.2d 567 (11th Cir. 1987), relied upon by the Solicitor General, the Seventh, Fifth, and Eleventh Circuits did not address the appropriate scope of review of Commission decisions.

[8] References to "Pet. App." refer to the appendix to the Petition for a Writ of Certiorari filed by the Solicitor General in this Court on April 2, 1990.

[9] Although the Tenth Circuit stated that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory

C. The Tenth Circuit Appropriately Deferred to the Expertise of the Commission

Given the Commission's expertise in occupational safety and health issues, it was also appropriate for the Tenth Circuit to defer to the Commission's reasonable interpretation of the regulation. Deference is routinely accorded by appeals courts to the decisions of specialized independent tribunals that resemble the Commission, and such treatment is appropriate in the case at hand.

The Tax Court, for example, whose similarities to the Commission have been discussed above, has long been recognized by courts to possess a special competence that warrants appellate deference to its decisions.[10] Thus in *Dobson v. Commissioner*, 320 U.S. 489 (1943), this Court noted that the Tax Court "deals with a subject that is highly specialized and so complex as to be the despair of judges" and, consequently, "[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter."[11] *Id.* at 498, 502.

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language," Pet. App. at 11a, the Court did not rule that the Secretary's interpretation was such an "alternate interpretation" or that it was otherwise reasonable.

[10] The Solicitor General may argue that the Tax Court is not in the same position as the Commission because the Commissioner of Internal Revenue has not been granted the broad policy-making authority given the Secretary. Although the Internal Revenue Code is far more detailed than the OSH Act, certain provisions give the Commissioner broad policy-making authority, *e.g.*, 26 U.S.C. §§ 482, 1502. Furthermore, as a practical matter, the very complexity of the Code gives the Commissioner substantial policy-making authority in his administration of the statute. *See id.* § 7805(a).

[11] Although the 1948 amendments to the Internal Revenue Code authorizing appellate courts to conduct "clearly erroneous" review of Tax Court factual findings overruled any suggestion in *Dobson* that factual findings of the Tax Court be given greater weight than those of ordinary district courts, *see* 26 U.S.C. § 7482(a); *Commissioner v. Duberstein*, 363 U.S. 278, 289 n.11, 291 n.13 (1960), "the statute does not profess to affect that portion of *Dobson* which discusses appellate review of questions of law." *ABKCO Industries, Inc. v. Commissioner*, 482 F.2d 150, 156 n.3 (3d Cir. 1973). Consequently, appellate courts continue to accord deference to Tax Court decisions. *E.g.*, *Magnuson v. Commissioner*, 753 F.2d 1490 (9th Cir. 1985).

Following the lead of *Dobson*, federal courts of appeals have often recognized the "special competence" of the Tax Court and accorded deference to the decisions of that tribunal. *See, e.g.*, *Estate of Simmie v. Commissioner*, 632 F.2d 93, 94 (9th Cir. 1980) ("Opinions of the Tax Court reflect 'that degree of special expertise which Congress has intended to provide in that tribunal' . . . . Therefore, we 'should not overrule that body, unless some unmistakable question of law mandates such a decision.'") (*quoting Sibla v. Commissioner*, 611 F.2d 1260, 1262 (9th Cir. 1980)); *accord Nickell v. Commissioner*, 831 F.2d 1265, 1269 (6th Cir. 1987); *Bradley v. Commissioner*, 324 F.2d 610, 612 (4th Cir. 1963).[12] *But see Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1413 (9th Cir. 1986) ("general rule of special deference to the Tax Court is inappropriate although its judgments in its field of expertise are always accorded a presumption that they correctly apply the law").[13]

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[12] *See also Guy F. Atkinson Co. v. Commissioner*, 814 F.2d 1388, 1391 (9th Cir. 1987) ("Tax Court's opinions bearing on the Internal Revenue Code are entitled to deference because of its special expertise in the field."), *cert. denied*, 485 U.S. 970 (1988); *Magnuson v. Commissioner*, 753 F.2d at 1493 (same); *ABKCO Indus.*, 482 F.2d at 155 (recognizing "that the Tax Court's resolutions of questions of law are persuasive and that it is desirable for the reviewing court to have the benefit of the Tax Court's expertise").

[13] It is also noteworthy that all of the practical reasons advanced by Petitioner in support of her argument that she is due deference would apply to the Commissioner of Internal Revenue with the possible exception of direct access to the federal courts. The Commissioner does not have direct access to courts but must

Similar to their treatment of Tax Court decisions, courts have also accorded deference to determinations of the Commission. *See, e.g., Bechtel Power Corp.*, 803 F.2d at 1000 ("[W]e will defer to the Commission's expertise in exercising the independent adjudicatory function assigned it by the Act because 'it is the Commission and not the Secretary which is charged with the final administrative adjudication of the Act.'") (*quoting Brennan v. Occupational Safety and Health Review Comm'n*, 513 F.2d 713, 715-716 (8th Cir. 1975)); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332, 1334 n.10 (6th Cir. 1978) (Commission entitled to great deference in its reasonable interpretation of OSH Act regulations; that deference "is founded primarily on the special expertise" of the Commission).[14]

D. Deference to the Commission Maintains the Political Balance Between Business and Labor Interests Struck by the OSH Act

In reviewing the decision below, this Court should take into consideration the role of the Commission in the overall statutory scheme. The Commission was established to resolve what Senator Javits characterized as "the most bitter labor-management political dispute in years."

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proceed through the Secretary of the Treasury (*see, e.g.*, 26 U.S.C. §§ 7401-7410); this, however, is a distinction without practical significance.

[14] *See also Marshall v. Cities Serv. Oil Co.*, 577 F.2d at 130 (expertise of Commission is presumed in matters of job safety and "Commission's interpretations regarding the meaning of the Act should be given substantial deference by a court") (*quoting Brennan v. Occupational Safety and Health Review Comm'n*, 501 F.2d 1196, 1199 (7th Cir. 1974)); *Duslop v. Rockwell Int'l*, 540 F.2d 1283, 1289 (6th Cir. 1976) (court owes Commission's interpretation of the OSH Act great deference because Commission members are appointed by the President by virtue of specialized training, education or experience and are empowered to perform the final administrative adjudication under the Act). *But see* cases cited at n.7, *supra*.

Legislative History at 193. The bill that had been reported out of the Senate Committee on Labor and Public Welfare was viewed as largely pro-labor. Faced with the prospect that the bill would not be passed at all, the Senate accepted Senator Javits' proposal as a means of sssuring a fair and independent method of furthering the purposes of the OSH Act. As Representative Scherle stated:

> The true goal of any occupational safety and health legislation can be simply stated. It is to foster improved standards of safety and health for workers, and to do it in a way that is both reasonable and fair.

Legislative History at 1014.[15] The need for fairness that was identified by Representative Scherle was a prime

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[15] The committee bill to which Representative Scherle objected did not provide for an independent adjudicatory commission. This was one of the prime faults that the Representative identified with the bill. Instead, the committee bill "follow[ed] the oversimplified approach of placing all functions in the Secretary of Labor." *Id.* While labor unions supported this scheme, it was roundly criticized by employers. As Senators Dominick and Smith noted in their dissent in the Committee Report, "the bill is opposed by the Administration, employers, State occupational health and safety agencies, and by national standards producing organizations while its primary support comes from the leadership of large unions." Legislative History at 200. These Senators objected to the fact that the Committee's bill settled "[a]ll functions, including standard setting, investigation, prosecution, adjudication, and review" in the Secretary of Labor. *Id.*

In contrast, Senator Javits' amendment, which was added on the floor of the Senate, established the Commission, which Representative Scherle described as "an independent presidentially appointed . . . Commission whose function would be to conduct hearings on alleged violations discovered by the Secretary and . . . [to] issue any necessary corrective orders, as well as assess civil penalties." Legislative History at 1014-15. The Javits amendment was designed to reassure business. "Where we can give [business] a measure of reassurance . . . by so simple a means as an autonomous enforcement board . . . I see no reason why we should not do it." Legislative History at 470 (statement of Senator Javits).

motivating factor behind the Javits amendment. The notion that an independent Commission would be fair to both labor and business interests prompted Senator Javits' amendment. To adopt the Secretary's position in this case would be to reduce the Commission's function to that of a fact finder and remove the keystone to winning business acquiescence to the OSH Act.

As the Seventh Circuit has reminded us, when a legislative provision is the result of a compromise, it is not the function of a court to undo the political balance which has been reached:

> [W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of another faction. The court must enforce the compromise, not the maximum position of one of the interest groups among which the compromise was struck.

Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983).

E. This Court's Decision Does Note Relate to Any Liability of Respondent

Finally, the Solicitor General suggests that to uphold the Court of Appeals would permit Respondent to escape liability, although it had been explicitly warned and had violated the Act. Brief for Petitioner at 37. The Commission, however, did not suggest that Respondent's failure to provide properly fitting respirators did not violate the Act. All it held was that the Secretary had charged Respondent under the wrong provision of the Regulations. *See* Pet. App. at 40a-44a. This is precisely what

one would expect from a commission established to provide "an *effective* and *fair* method of enforcement," of the OSH Act. Legislative History at 880 (emphasis in original).[16]

The Tenth Circuit was therefore correct to uphold the Commission's decision.

CONCLUSION

The Tenth Circuit exercised appropriate judicial review over the Commission's order and, accordingly, its decision should be affirmed.

Respectfully submitted,

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Dated: September 19, 1990

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[16] The Commission's job is to reach the proper result, not to reach the result advocated by one of the parties simply because of who that party is. *See General Dynamics*, 900 F.2d at 510 (deference to agency head in role of litigant would deprive claimants of impartial review).